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REPORTS
OF
Cases in Law and Equity
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LXIII.

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JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1872.

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- CLASS 1. DANIEL P. INGRAHAM.
" 2. ALBERT CARDOZO.*
" " WILLIAM H. LEONARD.†
" 3. GEORGE G. BARNARD.‡
" " ENOCH L. FANCHER.§
" 4. JOHN R. BRADY.
" 5. GEORGE C. BARRETT.

SECOND JUDICIAL DISTRICT.

- " 1. JASPER W. GILBERT.
" 2. ABRAHAM B. TAPPEN.
" 3. CALVIN E. PRATT.
" 4. JOSEPH F. BARNARD.

THIRD JUDICIAL DISTRICT.

- " 1. HENRY HOGEBOOM.||
" " PETER S. DANFORTH.¶
" 2. WILLIAM L. LEARNED.
" 3. THEODORE MILLER.
" 4. CHARLES R. INGALLS.

FOURTH JUDICIAL DISTRICT.

- " 1. PLATT POTTER.
" 2. AUGUSTUS BOCKES.
" 3. AMAZIAH B. JAMES.
" 4. JOSEPH POTTER.

FIFTH JUDICIAL DISTRICT.

- " 1. JOSEPH MULLIN.
" 2. LE ROY MORGAN.
" 3. CHARLES H. DOOLITTLE.
" 4. GEORGE A. HARDIN.

JUSTICES OF THE SUPREME COURT.

SIXTH JUDICIAL DISTRICT.

CLASS 1. DOUGLASS BOARDMAN.

- " 2. JOHN M. PARKER.
 " 3. WILLIAM MURRAY, JR.
 " 4. RANSOM BALCOM.

SEVENTH JUDICIAL DISTRICT.

- " 1. THOMAS A. JOHNSON.
 " 2. JAMES C. SMITH.
 " 3. CHARLES C. DWIGHT.
 " 4. ERASMUS DARWIN SMITH.

EIGHTH JUDICIAL DISTRICT.

- " 1. GEORGE BARKER.
 " 2. JOHN L. TALCOTT.
 " 3. CHARLES DANIELS.
 " 4. GEORGE D. LAMONT.

* Resigned, April 30, 1872.

† Appointed, by the Governor and Senate, to fill the vacancy caused by the resignation of Judge CARDOZO, May 11, 1872.

‡ Removed from office by Court of Impeachment, August 19, 1872.

§ Appointed, by the Governor, to fill the vacancy caused by the removal of Judge GEO. G. BARNARD, Sept. 21, 1872.

¶ Died, Sept. 11, 1872.

‡ Appointed, by the Governor and Senate, to fill the vacancy caused by the death of Judge HOENSBOM, Sept. 24, 1872.

JUSTICES DESIGNATED TO HOLD THE GENERAL TERMS.

<i>First Department.</i>	DANIEL P. INGRAHAM, Presiding Justice.	
	ALBERT CARDOZO,*	
	GEORGE G. BARNARD,†	} Associate Justices.
	WILLIAM H. LEONARD,‡	
	ENOCH L. FANCHER,§	
<i>Second Department.</i>	JOSEPH F. BARNARD, Presiding Justice.	
	JASPER W. GILBERT,	} Associate Justices.
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<i>Third Department.</i>	THEODORE MILLER, Presiding Justice.	
	PLATT POTTER,	} Associate Justices.
	JOHN M. PARKER,	
<i>Fourth Department.</i>	JOSEPH MULLIN, Presiding Justice.	
	THOMAS A. JOHNSON,	} Associate Justices.
	JOHN L. TALCOTT,	

FRANCIS C. BARLOW, *Attorney General.*

* Until April 30, 1872.

† Until Aug. 19, 1872.

‡ From May 11, 1872.

§ From Sept. 22, 1872.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

HUMISTON vs. BALLARD.

The Supreme Court possesses no power to award costs in an action pending, at the time, in a county court. Nor has a county court, or county clerk, the power to order costs accruing in the Supreme Court to be added to a judgment rendered by the county court.

A county court, without legal authority, ordered a case, pending in it, and which had never been legally removed from it, to be heard at a general term of the Supreme Court. When it came there, the court said it was improperly there and refused to hear it, and entered no judgment for costs, or otherwise, but entered a mere order dismissing it from the Supreme Court. *Held* that upon a final recovery, by the plaintiff, he was not entitled to the costs in the Supreme Court at the general term, when the case was sent there by the order of the county court.

The legislature, in the enactment of section 871 of the Code, by referring to *the judgment* to be appealed from, did not intend to refer to it as a judgment to be afterwards increased by interest, but to the judgment as it was at the time the party appealed from it.

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THIS is an appeal by the defendant from an order made at special term, in the sixth judicial district, affirming the taxation of costs by the clerk of Cortland county. The action originated in a justice's court, and was upon contract. The plaintiff recovered, in the justice's court, \$80, besides costs. An appeal was taken to the county court, and a trial there resulted in a verdict for the plaintiff for \$90. From this an appeal was about to be taken to the Supreme Court, and a case with exceptions was made for that purpose. The county court of Cortland thereupon made an order that the exceptions be heard in the first instance at the general term of the Supreme Court. It was placed upon the calendar of the general term, and submitted upon points and briefs. The general term held that the case could not be heard in that court, upon such an order of the county court, and refused to entertain the case. The plaintiff then perfected judgment in the county court. The defendant then appealed to the Supreme Court upon said case and exceptions, and obtained a reversal of the judgment, and a new trial. The then county judge, being disqualified by reason of having been counsel, certified the cause into the Supreme Court, and the action was again tried, at a circuit, and a verdict rendered for the plaintiff, for \$75. On this verdict the plaintiff noticed his costs for adjustment before the clerk. The defendant appealed from the adjustment, and claimed that a \$75 verdict at that time was more than \$10 more favorable to the defendant than the \$80 verdict, with interest thereon, had in the justice's court, and claimed costs in favor of the defendant. In the plaintiff's bill, as taxed by the clerk, was \$70, the costs in the Supreme Court at general term, when the case was sent there by the order of the county court, which was specially objected to by the defendant, on the ground that the case was dismissed by the Supreme Court for being irregularly there, not on appeal, and that the Supreme Court had

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made no order for costs. The appeal from such taxation was heard at a special term of the Supreme Court, and the taxation or adjustment of the clerk affirmed; and the case was now before the court upon an appeal from this order of the special term. Some other questions arose in the case which will sufficiently appear in the opinion.

H. Ballard, for the plaintiff.

A. P. Smith, for the defendant.

By the Court, P. POTTER, J. We must accept as the law of this case, that the general term correctly dismissed the case as being there without authority; or, in other words, that court had no jurisdiction to give judgment between the parties, and they gave none. The only judicial act that court could perform, in the case, was to dismiss it. Costs now, in all cases, are the creation of the statute, and they are given or withheld as the statutes direct. Of course if the court had no jurisdiction to render a judgment, and having omitted to award costs—even the costs of a motion—it follows, that if any costs of that proceeding are recoverable, it must be by reason of some positive regulation of the statute. (*King v. Poole*, 36 Barb. 247.) But it must be conceded that this rule applies only to that class of cases where the want of jurisdiction appears upon the face of the proceedings, as it did in this case. There is a class of cases, however, in which the proceedings are in the form prescribed by law; where the court below had no jurisdiction of the subject matter; and where the statute provides the form of appeal to this court, and even to the Court of Appeals, to have it declared that the court below had no jurisdiction in which the courts do possess the power to award judgment, and costs. Such was the case of *Kundolf v. Thalheimer*, (12 N. Y. 593,) where the county court assumed civil jurisdiction under the consti-

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tution of 1846, and kindred cases. The Code, section 344, expressly provides for such cases. Judgments in the county courts, in such cases, created apparent liens upon property of defendants sufficient to protect ministerial officers in enforcing the same by execution. The distinction between the cases is apparent. In the case we are reviewing, it was not in this court by any proceeding known to the law. It is very clear, to me, that this court then possessed no power to award costs in an action at that time depending in the county court. And it is not before us to decide whether they might have granted the costs of a motion to dismiss the case. They made no order as to costs. It is just as clear to me that neither the county clerk of Cortland, nor the county court of that county, had the power to order costs accruing in the Supreme Court to be added to a judgment in the county court of Cortland. In the certifying an action in the county court to the Supreme Court for the reason that the county judge is incapable of trying it, as in this case, though for the purpose of trial the jurisdiction is vested in the Supreme Court, yet, for this purpose, the judge at the circuit is but the substitute for the county judge, and the proceedings therein are to be the same as might have been had in the county court, if such cause or matter had remained therein. But it is not in regard to the costs of the circuit that any question arises.

This point of the case is simply stated, thus: The county court, without legal authority, ordered the case while depending in it, and never having been legally removed from it, to be heard at general term of the Supreme Court. When it came there, the general term said it was improperly there, and refused to hear it, and entered no judgment upon it for costs, or otherwise, but entered a mere order dismissing it from that court. Then, the question is, can costs be taxed against the defendant, the same as if the action had been legally pending in that court? By what statute, then, are

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these costs allowed? The plaintiff has charged at the rate provided in subdivision 5 of section 307 of the Code. But this subdivision allows costs only in cases of *appeal*. This was not an appeal, and that section does not apply to the case, and no provision in the Code, in regard to costs, is found applicable to it. And this difficulty is increased by the fact that the general term of the Supreme Court neither reversed nor affirmed the case, nor themselves made an order for costs. Indeed, an order from that court allowing costs not provided for in the Code, would have been without authority. The special term, whose order we are reviewing, does not place its decision upon any provision of the statute, or upon any precedent, or adjudication; but upon a kind of *quantum meruit* for services actually performed, and upon the ground that the illegal order of the county court was made at the suggestion or request of the defendant's counsel. And concludes, "that the court not having power to make such an order *does not deprive the opposite party of his costs incurred in the proceedings under said order.*" With all due deference, I cannot concur in this holding.

The fee bill provided by the Code is confined to proceedings conducted according to its provisions; and for no other. The rule of the special term makes a new fee bill not known to the Code—not known to legal and legitimate proceedings in an action under it—a rule very convenient for bunglers in practice to secure compensation for services in all cases of mistakes, or even of designed wrong. Suppose the county court of Cortland county had sent the case directly to the Court of Appeals, instead of the Supreme Court; it had equal power to do so. The compensation in the Court of Appeals is still better for the prevailing party. The order of the special term would have been equally sound had it allowed the costs of the Court of Appeals in the supposed case. Equally so had the county court ordered the case to an arbitration. The

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prevailing party might have performed an equal amount of labor, but can the clerk or the court allow costs for such illegitimate services? The legal presumption is, that every man knows the law; this presumption ought not to be destroyed, when applied to lawyers. The plaintiff had a plain method provided by law, to get rid of this illegal order, by proceedings known to the practice, and for which the Code allows compensation. He could have applied to have this illegal order vacated; if the motion was denied, the Code furnishes a remedy by appeal to this court. These would be legitimate services for which the fee bill, or the court, would allow compensation. This was the true remedy. In this regard, the rule adopted by the clerk and the special term was error.

The defendant has raised another point on the appeal—that the judgment in the county court, for \$75, is more favorable to him by an amount exceeding \$10, than the verdict of \$80 in the justice's court; that is, the action being one upon contract, casting interest upon the \$80 judgment, there is more than \$10 in favor of the last judgment. I do not think the legislature, in the enactment of the 371st section of the Code, in referring to *the judgment* to be appealed from, intended to refer to it as a judgment to be afterwards increased by interest, but to the judgment as it was at the time the party appealed from it. As it was then a judgment of \$80, the subsequent judgment of \$75 was not \$10 more favorable. Although for some purposes interest is the incident and becomes a part of a judgment, for other purposes it does not. By a provision of the Revised Statutes, (2 R. S. 364, § 9,) interest on judgments, like costs, is directed to be indorsed on the execution from the date of recovering the same. I think the judgment, independent of interest, is intended as the test of difference between judgments. But the rule, *stare decisis*, is invoked as controlling, in the sixth judicial district, where this case originated. I feel

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bound by that rule, until reversed by a higher court. This being so, I do not feel bound to discuss the point whether or not the notice of appeal brings the defendant within the provisions of the 371st section of the Code, as amended in 1866.

The result is, that the order of the special term should be modified by striking out of the plaintiff's bill of costs \$70, charged for the costs of the argument in general term of the Supreme Court, when the case was irregularly there, with \$10 costs of this motion and \$10 costs at special term, to the defendant on this appeal.

[THIRD DEPARTMENT, GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller*, P. J., and *Potter and Parker*, Justices.]

SENECA DUTCHER and GRANVILLE PORTER, administrators
&c., vs. STRATTON PORTER.

After judgment, it will be assumed that evidence sufficient to sustain it was given.

Where, at the trial, a party assumes and treats the questions raised as being questions of law, to be decided by the court, and they are passed upon and ruled against him, he cannot, on appeal, insist that the questions decided by the court involved a question of fact.

On the 19th day of September, 1865, the defendant executed his promissory note to D. for \$150, payable, with interest, two years after date. On the 15th of November, 1865, the defendant executed another instrument, by which, for and in consideration of a certain sum of money, together with all claims or demands that D. held against him, bearing date November 15, 1865, bound himself, his heirs, executors, administrators and assigns, to support D. during his natural life. In an action by D.'s administrators upon the promissory note,

Held 1. That the obligation contained in the instrument dated November 15, was one that could be enforced, if the defendant refused performance, or damages for non-performance could be recovered.

2. That in the absence of any evidence upon the subject of performance or non-performance, the court must presume that was not a point, in the case; or, if it was, then the burthen of proof was upon the plaintiffs.

Dutcher v. Porter.

3. That the language of the agreement, of November 15, 1865, showed that the parties had an accounting, on that day; and that the legal presumption would be that such accounting included all prior liabilities.
4. That such agreement, for its consideration, included the note sued upon, as one of the claims or demands which D. held against the defendant at the date of the agreement. And that the accounting then had, between the parties, was presumptive evidence of a settlement of all demands, including such note.

By a well established rule of law, the giving of a promissory note is *prima facie* evidence that, at the date of it, there was a settlement of all demands between the parties, and that the note remained as the only claim existing between the parties to it; or at all events, from the maker to the payee.

mm

A PPEAL from a judgment entered at a special term, on a trial at the circuit, before the court, without a jury.

The action was brought by the plaintiffs as administrators of Cortland Dutcher, deceased, to recover the amount due upon a promissory note, of which the following is a copy :

“Red Brick, Sept. 19th, 1865.

‘\$150. Two years from date, for value received, I promise to pay Cortland Dutcher, or bearer, the sum of one hundred and fifty dollars, with interest from date.

WALTER M. PORTER.
STRATTON PORTER.”

The defendant set up a counter-claim, and also claimed that a certain contract was executed by the defendant, of which the following is a copy :

“For and in consideration of a certain sum of money, together with all claims or demands that the said Cortland Dutcher holds against me, bearing date November 15th, 1865, I hereby bind myself, my heirs, executors, administrators and assigns, to provide and support the said Cortland Dutcher from this date, on and during his natural life.

Dated November 15, 1865.

STRATTON PORTER.

Witness, WALTER M. PORTER.”

Dutcher v. Porter.

The execution of this note was admitted. There was some evidence offered, in the case, all of which was stricken out, on motion of the plaintiffs' attorney. The defendant then, in open court, by his attorney, withdrew his counter-claim, and rested his case solely upon the instrument. After argument of counsel, the court reserved its decision, and subsequently, viz., in February, 1870, ordered a judgment for the defendant, with costs; holding that the instrument was of itself a perfect defense to the plaintiffs' action. To all of which the plaintiffs' counsel excepted. From the judgment so entered, the plaintiffs appealed to the general term.

H. R. Low, for the appellants.

Niven & Thompson, for the respondent.

By the Court, P. POTTER, J. From the case, as made up, it is very difficult to determine whether any error was committed, on the trial. The facts transpiring on the trial, as stated in the case, were stricken out, on motion of the plaintiffs' attorney, and yet we can see that there must have been some evidence which was considered by the judge, in relation to the agreement set up in the answer as a counter-claim, and used on the trial only as a defense. But no point is made that the findings are against the evidence. This agreement, though denied in the plaintiffs' reply to the answer, must have been proved, or admitted, on the trial, which proof could not have been included in the testimony stricken out; for, in open court, the defendant rested his case solely upon this instrument, not as a counter-claim, but as a defense. No objection or exception was taken that the instrument had not been proved. By implication this must be deemed to have been admitted. The decision of the judge was based upon the effect of the instrument, which could not have been done, without proof of it, in some form.

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It is perhaps an important fact to know in whose possession this instrument was found, if effect is claimed for it as a defense. If it was found in the defendant's possession, there would be no evidence of its having been an agreement made and accepted by the parties. Otherwise, perhaps, if in the possession of the intestate. But as the case presents no exception that the judgment is against the evidence, and the judge decided that the instrument itself was a defense to the action, we must assume, upon this review, that the instrument was duly proved. Indeed the plaintiffs' brief concedes this. It says the defendant put it in evidence; and also, that "the only question to be determined, in this case, is whether the instrument *given in evidence* constitutes any defense to the action." This statement concedes, also, I think, that this instrument was found among the papers of the intestate; which fact the plaintiffs' counsel also assumes, in his third point, for the sake of the argument. The case, however, shows no evidence given upon either of these points. After judgment, we must assume that evidence sufficient to sustain it was given.

I understand the rule to be, in such cases, that where, at a trial, a party assumes and treats the questions made as being questions of law, to be decided by the court, and they are passed upon and ruled against him, he cannot, on appeal, insist that the questions decided by the court involved a question of fact. So held in *Barnes v. Perine*, (12 N. Y. 18.)

Upon this statement of facts to be assumed, the intestate accepted, on his part, the agreement made by the defendant on his part. The single question that remains is, was this a binding agreement, so as to create a defense to the note sued upon?

There was then an agreement in the possession of the intestate, expressing a good consideration, and binding upon the defendant. The defendant had received, as the

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agreement admits, a certain sum of money, and besides, certain demands which the intestate held against him; and in consideration of these, the defendant bound himself, his heirs, executors, administrators and assigns, to support the intestate during his natural life. This was an obligation that could be enforced, if the defendant refused performance, or damages for non-performance could be recovered. In this case there was no evidence upon the subject of performance or non-performance, and we must presume this not to be a point in the case; or, if so, then the burthen of proof was upon the plaintiffs, and none has been presented.

If we are right in these views, the only question in the case is, the construction of the agreement set up as a defense, viz., does the agreement in question, for its consideration, include the note sued upon, as one of the claims or demands which the intestate held against the defendant at the date of the agreement, and which formed the consideration for his written promise?

It is well settled that the intention of the parties, in a written contract, must be collected from the language of the instrument, and from the whole instrument taken together. And in order to carry that intention into effect, the literal import of the words used may be disregarded, if a reasonable construction of the instrument demands it. On the 19th of September, 1865, the note in suit was given; on the 15th of November, less than two months afterwards, the agreement set up as a defense was given. By the well established rule of law, the giving of the note is *prima facie* evidence that, at the date of it, there was a settlement of all demands between the parties, and that the note remained as the only claim existing between the parties to it; or at all events, from the maker to the payee. (*Lake v. Tysen*, 6 N. Y. 461, and cases cited.)

The agreement set up as a defense would, in like manner, be *prima facie* evidence of an accounting between the

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same parties, and especially of all that the intestate held against the defendant, including the note in question, but for the expression therein, in the words "*bearing date November 15, 1865.*" The meaning of these words is the only question in the case. Though these words, ordinarily, and standing alone, would exclude the note of 19th September, yet the preceding words in the agreement are sufficient to show that the parties had another accounting on the 15th of November, and the legal presumption would be, that the accounting of the last date included all prior liabilities. The agreement recites that the defendant, *on that day*, received from the intestate a sum of money; he also received claims and demands of the intestate against him, on that day. How much money, and what was the character of the demands, and of what they consisted, the agreement fails to state; but if the parties on that day settled, or had an accounting, and brought all their demands down to that date, as the law will imply, then all the demands so taken into the account would *bear date on the 15th of November, 1865.* If the note in question, and the money received on that day, (15th November, 1865,) were intended to be made demands bearing date on that day, the agreement is consistent in its language. The money received certainly bore date on that day. Something besides money, in the character of claims and demands, was received on the same day. The parties therefore had an accounting on that day. They had an accounting only two months before. Unexplained, the presumption is, that all their demands were included. It is improbable that the intestate would have paid money to a person indebted to him, when he held his note. I think the accounting which was had on the date of the agreement is presumptive evidence of a settlement of all demands. (*Lake v. Tysen*, 6 N. Y. 461. *Defreest v. Bloomingtondale*, 5 Denio, 304.)

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There has been no error shown which is sufficient to reverse the judgment. It should be affirmed.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, February 7, 1871. *Muller, P. Potter and Parker*, Justices.]

MORSE vs. SHERRILL and WRIGHT.

It is the clear province of the jury to deal with facts; especially in cases of conflict of testimony; and the province of the jury only.

To justify an appellate tribunal in setting aside a verdict on the ground that it is against the weight of evidence, it must be *entirely* against the weight of evidence.

A new trial will not be granted where the testimony is contradictory, and the character and credit of the witnesses questioned, on the ground that the verdict is against the weight of evidence.

The verdict of a jury, in cases of conflict of testimony, can only be set aside when the case itself presents the evidence that the jury must have been influenced by passion, prejudice or mistake.

When there is no decided preponderance of evidence on either side, the case depending mainly upon the conflicting testimony of the parties themselves, who are equally respectable and unimpeached, the jury are the proper persons to decide between them, as to whose testimony is entitled to the greatest credit.

Although there may be cases in which the ends of justice demand that the court should possess the power to correct *abuses* committed by a panel of jurors, that power should be limited by reasonable rules: It must be an abuse; it must be such a verdict as evinces that it was the result of passion, prejudice, mistake or corruption; such a verdict as shocks the common judgment; or such as is without evidence to support it, or is so against a striking preponderance of evidence that a common exercise of judgment demands its reversal.

THIS action was brought to recover of the defendants, jointly, the sum of \$600 and interest from October 18, 1867, being the balance due upon a promissory note given by the defendants.

63	27
80h	184
63	21
91h	637
63	21
92h	73
63b	21
146ap	448

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The answer of the defendants admitted the execution and delivery of the note in question to the plaintiff. It also alleged that the defendant Wright signed the note as the surety of the defendant Sherrill, and that on or about the 10th day of November, 1868, the defendant Sherrill was the holder and owner of a certain bond and mortgage, given by one Doolan to the father of the defendant Sherrill, dated April 1, 1867, upon which there was due the sum of \$600 and some interest. It was also alleged by the defendant Sherrill that in November, 1868, he assigned said bond and mortgage to the plaintiff, with the understanding, agreement and direction that the said mortgage should be applied to the payment and satisfaction of the said note, as far as the same would satisfy and pay it, and that he (Sherrill) would pay any balance. This was denied by the plaintiff, and this was really the only question legally controverted on the trial, though other collateral, and some immaterial, issues were presented on the trial, which it is not necessary to notice.

The action was tried at the Greene circuit, in February, 1870, when the jury found the main issue in the case in favor of the defendant, and rendered a verdict in favor of the plaintiff for \$20.70, which was the balance due on the note sued upon, over and above the amount of the bond and mortgage so assigned as aforesaid. This verdict established that the jury believed the mortgage was assigned in payment of the note, as alleged in the answer. The testimony, however, was directly in conflict upon this issue. The defendant Sherrill, in positive terms, swore to the agreement as set forth in his answer. The plaintiff, in as positive terms, stated, in effect, that the mortgage was assigned to meet the defendant's portion of losses in a copartnership relation between them. Both parties were examined at great length, upon this and other issues made on the trial.

After the rendering of the verdict, the plaintiff's coun-

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sel made a motion for a new trial, upon the judge's minutes, which motion the judge granted, and made an order to that effect. From that order the defendant appealed to this court.

Givens & Osborn, for the appellant.

Olney & King, for the plaintiffs.

By the Court, P. POTTER, J. We learn the reasons of the learned judge, in granting the order for a new trial, from the language used by him, which is as follows: "I am satisfied that the verdict in this case is wrong, and entirely against the weight of evidence." "I am also impressed with the conviction that the jury were misled by issues outside of the testimony, and which should not have been considered." If the jury were misled in this case, it was not for want of a clear presentation of the case, and of the duties of jurors, by the charge of the court. No charge could be made, more clearly to present the issues in the case, and the manner of weighing evidence by a jury, in a case of conflict, than the one given in this case by the learned judge. Nor can there be a doubt that the jury clearly understood the charge; and clearly understood the two opposite theories of the case; for their verdict was exactly that which the learned judge directed them to find, in case they adopted the defendant's theory, and his evidence as being the most reliable; as the following extracts from the charge will show: "Assuming that the parties are equally entitled to credit—that each is respectable and unimpeached—then the case is balanced, and the plaintiff entitled to recover. So, also, if you believe the plaintiff's story is corroborated by Smith—that the evidence as to the receipt is true—the plaintiff then is entitled to recover. If, however, you believe the defendant; that the plaintiff's and his witness

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Smith's testimony is not to be believed, and that their evidence is untrue, the defendant is entitled to a verdict. You must be satisfied, however, of this before you find a verdict for the defendant." "You have nothing to do, gentlemen, with the litigations which Mr. Morss has had heretofore, or with his character, outside of this testimony. You have nothing to do with anything independent of the evidence in this case. You must discard from your minds any lodgment it may have made, to prejudice you against the one side or the other. You must be governed by the evidence, and by nothing else. If you are satisfied that the defense has succeeded—that they have established a clear and satisfactory case of payment—then you will render a verdict in favor of the defendants. If, on the other hand, they have failed to establish their defense, your verdict should be for the plaintiff, for the amount of the note. If the defendant is entitled to your verdict—if he has established his defense—then the verdict for the plaintiff will be about twenty dollars and seventy-one cents. If the plaintiff has established his claims—if the defense is not established—then the plaintiff is entitled to recover in the amount of six hundred and ninety-eight dollars and sixty-nine cents."

The verdict for the plaintiff for \$20.71, which the jury were instructed to find, in case they believed the defendant had established the defense he had sworn to, shows most clearly whose evidence they believed to be true. As I understand the rule, it is the clear province of the jury to deal with facts; especially, in cases of conflict of testimony; and the province of the jury, only. The rule on this subject, I think, was clearly laid down in the case of *Honsee v. Hammond*, by the general term in the third district, in a case where there was conflicting evidence, by Justice MILLER, who said: "The verdict must be *entirely* against the weight of evidence, to justify an appellate tribunal in setting it aside. The jury, whose province it

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was to weigh and pass upon the evidence, have decided that the preponderance was against the defendant. A new trial will not be granted where the testimony is contradictory, and the character and credit of the witnesses questioned, on the ground that the verdict is against the weight of evidence." "The jury have decided the questions of *fact*, * * and there is no rule of law which allows us to interfere with, or to set aside, their verdict." To sustain this opinion, the learned judge cited the case of *Culver v. Avery*, (7 *Wend.* 384,) in which Justice SUTHERLAND remarked, "A verdict must be *most clearly and manifestly* against evidence, to justify a court in setting it aside." "Whatever may be the opinion of the court upon the strict weight of evidence, * * the jury, whose province it was to weigh and pass upon it, who saw and heard the witnesses, have thought the preponderance against the defendant. I should have been inclined to a different conclusion; *but the jury not only had the right*, but were more competent, fairly and discreetly to decide the question, than we are. Their decision cannot be disturbed." The cases are almost innumerable, which may be cited to the same effect, much stronger than the present. A well considered case is found, decided at general term, in the eighth district, before Grover, Daniels and Marvin, JJ., in which Grover, J., said, (29 *How.* 170 :) "My impression is strong that the verdict was not in accordance with the real truth of the case. Yet, I am not prepared to say that the case is so flagrant as to show passion, prejudice or inattention to duty on the part of the jury. There is positive evidence of one witness, in support of the verdict, and it would be going further than any reported case authorizes, to set aside the verdict." And in the case of *Murphy v. Boker*, (3 *Rob.* 4, 5,) the same rule is recognized—that the verdict of a jury, in cases of conflict of testimony, can only be set aside when the case itself presents the evidence that the jury must

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have been influenced by passion, prejudice or mistake. I have, myself, in numerous instances within my own recollection—some of which cases are reported—held to the same rule.

But the case before us, itself, does not even show a preponderance of evidence at all worthy of remark. The plaintiff and defendant were directly in conflict, it is true; and as to them, the learned judge intimated to the jury that they were each respectable and unimpeached. Presenting the case, then, as to numbers, respectability and character of witnesses, the parties were equal. Both stories could not be true; one might be. Who so proper to decide between the veracity of witnesses, in such a case, as the jury? They (the jury) are men of the vicinage, knowing the character of both; witnessing their manner of testifying, judging of the reasons, motives and interest which influenced the parties, and the probabilities of the truth of their respective statements, their opinions are better than ours; better than that of the learned judge who tried the case.

With all respect, the jury were far more competent than the court, to determine this. It would, in my opinion, violate the theory of our system of jurisprudence, and render the boasted right of trial by jury a useless formality, and an excrescence upon the system, for courts to set aside verdicts upon the ground of differing with a jury as to the correctness of a finding of facts, which is conceded to be the province of a jury. In fact, such a rule would deprive the jury of their so-called province. And the court would possess the province not only of directing them as to the law, but as to the facts, also. This is not my understanding of the true theory of our system. I think the exercise of such a power, if it was possessed by the judge, would have the effect to impair public confidence in the courts, and subject the judge to the imputa-

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tion of invading the domain of the jury box, or of usurping the duties of the jury.

I would not claim that the court is without power to correct *abuses* committed by a panel of jurors. There may be cases in which the ends of justice demand this; but this power is limited by reasonable rules. It must be an *abuse*; it must be such a verdict as evinces that it was the result of passion, prejudice, mistake or corruption; such a verdict as shocks the common judgment; or such as is without evidence to support it; or is so against a striking preponderance of evidence that a common exercise of judgment demands its reversal. The case before us possesses no such features. I think we cannot even say that the fair weight of evidence is against the result. The learned judge very properly cautioned the jury against any influence or feeling against the plaintiff on account of his litigious character. This may have been necessary. It may be the jury knew this character; and possibly, notwithstanding the charge, the jury may have known, and unconsciously been influenced by his character; but we have no right so to conjecture. It is, I think, an equal chance that it was an honest, intelligent, and perhaps a righteous, verdict. It is not against the weight of evidence, unless it is assumed that the witness Smith corroborates the plaintiff. Of this the jury could best judge. In reading the testimony of Smith, it does not carry to my mind a conviction of its reliability. If the jury regarded this evidence as suspicious, and as improperly procured by the plaintiff to sustain and support his own, then it should not only be rejected, itself, but would have the effect to cast suspicion upon the evidence of the plaintiff.

The wisdom of the time-honored rule of the common law, which refers questions of fact to the jurors, and questions of law to the judge, is not more conspicuous in any class of civil cases than such as present the question of conflict of evidence. Cases of this nature frequently come

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before the courts for review, in which it is found that men of equal intelligence and judgment differ in their knowledge of human character, in experience, in habits, in temperament and in mental organization. But from such a body of men can be obtained that average judgment which is the result of their deliberations, which, by our jury system, is a juster standard than the opinion of any one man, in the determination of a question of fact.

The learned judge adds, that he is impressed with the conviction that the jury were misled by outside issues. As there is no evidence in relation to this in the case, we have nothing, upon this question, on which we can review it. This furnishes no ground upon which an appellate court can act. This is not in the case for us to pass upon. It is not a legal ground, that can be reviewed, had the ground of those impressions been stated. If these impressions are right, this court cannot see them in the case; if wrong, the party injured would be remediless. He could not correct the error.

I have not been able to find authority to sustain the order appealed from. I think it must be reversed, and the defendant permitted to perfect such judgment as the verdict entitles him to.

Order reversed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *P. Potter* and *Parker*, Justices.]

ALFORD vs. STEVENS.

Where a justice of the peace obtained jurisdiction of an action, in form replevin, by a summons duly issued and served, the appearance of parties, and the joining of issue therein; and after the cause had been twice tried before juries, neither of which could agree upon a verdict, the cause was, by agreement of parties, submitted, upon the evidence taken, to the justice, who rendered a judgment therein; *Held* that whatever defects there might have been in the affidavit and form of the bond, they should be regarded as waived; and that, on appeal from the judgment, the court would not enter upon an examination of such defects.

If there is sufficient evidence, if believed by a justice of the peace, to sustain a judgment, the judgment rendered will not be reversed, on appeal, because it was given without sufficient evidence to sustain it.

When there is a conflict in the evidence, it is for the justice to determine which is most credible.

When the judgment of a justice of the peace is sustained by positive, direct and corroborating evidence, sufficient to uphold a judgment, it is not the duty of the reviewing court to measure, in nice scales, the weight of conflicting testimony.

THIS action was commenced in a justice's court, in the form of replevin, to recover possession of a buffalo robe, of the value of fourteen dollars. Preliminary papers were made out for that purpose, the affidavit being made by an agent of the plaintiff. This agency does not appear in the affidavit itself, nor any reason why the plaintiff did not himself make it. And the matters stated in the affidavit are of positive knowledge, which could hardly be had by a mere agent. The defendant, however, put in an answer to the complaint and went to trial upon the issues formed. It was twice tried before juries, neither of which could agree upon a verdict; and then by agreement of parties the matter was submitted to the justice upon the evidence taken. The justice rendered a judgment in favor of the plaintiff, for the value of the robe; an appeal was taken to the county court of Madison county, where the judgment was affirmed; and from the judgment of affirmance an appeal was taken to this court.

Alford v. Stevens.

D. W. Cameron, for the plaintiff

N. Foote, for the defendant.

By the Court, P. POTTER, J. The justice obtained jurisdiction, in this action, by a summons duly issued and served, the appearance of parties, and the joining of issue therein. However defective the preliminary proceedings, in the affidavit, and form of the bond, may have been, after two trials by jury, in which both parties appeared by counsel, and after agreeing to submit the case to the justice for his decision, the defects in the preliminary proceedings (if there were any) are to be regarded as waived. And this court will not enter upon an examination of that point.

There is no other question in this case which can be reviewed by the court but this; that the judgment was given without sufficient evidence to sustain it, and that it is against law, and the weight of evidence. Upon a careful reading of the case, I do not think these objections are well taken.

First. There is sufficient evidence, if it was believed by the justice, to sustain the judgment; and though there was a conflict in the evidence, it was for the justice to determine which was most credible. He knew the parties, and heard them testify, and it was for him to judge of this question.

Second. Assuming that the justice correctly weighed the evidence, then the judgment is not against law. The property, *then*, was the plaintiff's; and then the act of Richardson was tortious, and the defendant could get no good title from him; his possession was wrongful. If the justice was right in his findings of fact, Richardson violated his agreement by delivering the plaintiff's robe to the defendant; and the defendant's title was no better than Richardson's.

Third. The judgment is sustained by positive, direct

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and corroborating evidence, sufficient to uphold a judgment. It is not the duty of the reviewing court to measure, in nice scales, the weight of evidence, when it is in conflict. It is not strikingly so, if at all. Indeed it is not for us to say; but as it reads, I think the justice correctly decided the facts. He made no error in ruling, and I think the judgment should be affirmed.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *Miller, P. Potter and Parker, Justices.*]

ASA C. TEFFT *vs.* ASA MUNSON and WILLIAM RANGLES,
Commissioners for loaning certain moneys of the United
States for the county of Washington.

Where a grantor with warranty has no title to the premises conveyed, at the date of the conveyance, but he subsequently acquires an estate therein, such acquired estate will enure to the benefit of the grantee; if not by estoppel, it will upon the principle of avoiding circuitry of action.

On the 18th day of January, 1848, G. P., being the owner in fee of certain lands, let his son, M. B. P., into the possession thereof. On the same day, M. B. P. forged a deed of said lands, purporting to convey the title from G. P. to him, and recorded such deed in the clerk's office, May 27, 1850. On the 1st of October, 1850, he executed a mortgage of said lands to the loan commissioners, for \$1000, money then loaned to him by them; which mortgage was in the usual form, and contained a covenant of seisin and warranty. Such mortgage was, at the time it was executed, duly entered upon the books of the loan commissioners, kept and provided for that purpose, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the county clerk's office, which deed purported to be executed by M. B. P. and wife to G. P. On the 16th of December, 1859, G. P. conveyed said lands to M. B. P. by warranty deed, which was duly recorded January 14, 1860. And on the 31st day of January, 1867, M. B. P. sold and conveyed the land, by warranty deed of that date, to the plaintiff, who paid full value therefor, without actual notice of the loan office mortgage. A statute foreclosure of said mortgage being

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commenced, on the 28th of October, 1868, this action was brought to restrain such foreclosure, and to have the mortgage decreed void as against the plaintiff.

Held, 1. That the mortgage in question was an instrument within the recording acts.

2. That although the mortgagor, at the date of the mortgage, had no title to the premises, yet he having, while in possession of them, and while his covenant of warranty was in full force, become vested with the title in fee, such title enured to the benefit of the mortgagees; and the mortgagor, and those claiming title from him subsequent to the mortgage, were estopped by such covenant of warranty.

3. That as between the mortgagor and the mortgagees, the interest of the latter, in the lands, became, upon the mortgagor's subsequently acquiring title, as perfect as if the mortgage had been executed by M. B. P. after the date of his title. And that the mortgagees did not lose such interest by the mortgagor's conveyance to the plaintiff.

4. That the recording acts were also controlling in favor of the defendants, the mortgagees.

A mere grant operates upon the possession; it simply conveys the estate and interest which the grantor had, in the premises granted. If the grantor had no estate, there is no estate to be accepted; so that on the conveyance by grant only, of lands, by deed or mortgage, the grantee is not estopped from averring that his grantor had nothing in the lands granted.

But where the conveyance is by warranty, the rule is different. In that case, the warranty will rebut and bar the grantor, and his heirs, of a future right; not because a title ever passes by such a grant; but the principle of avoiding circuity of action interposes and prevents the grantor from impeaching a title to the soundness of which he must answer, on his warranty.

The cases of *The Farmers' Loan and Trust Co. v. Maltby*, (8 Paige, 361,) and *Doyle v. The Peerless Petroleum Co.*, (44 Barb. 239,) commented on, and distinguished from the present.

THIS action was brought to restrain the foreclosure of a mortgage executed by Martin B. Perkins and his wife, on the 1st day of October, 1850, to secure the loan of \$1000 that day made by the then loan commissioners to said Martin, and to have the judgment of the court that said mortgage is not a lien upon said premises against the grantees and assigns of Martin B. Perkins, the mortgagor.

The action was commenced January 23, 1869, in Washington county, and tried before Justice Bockes, at a special term, on a conceded state of facts, which facts were as

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follows: On the 18th day of January, 1848, one Gamaliel Perkins purchased of Cortland Howland certain lands in the town of Fort Edward, in said county of Washington, and took a conveyance thereof to himself, with covenant of warranty, and let his son, Martin B. Perkins, into the possession thereof. Said deed was duly recorded March 7, 1848. On the 18th day of January, 1848, and while said Gamaliel Perkins had title to said lands, said Martin B. Perkins, being then in possession thereof, forged a deed of said lands, purporting to convey the title from said Gamaliel Perkins to said Martin B. Perkins, and recorded said deed in the clerk's office of Washington county, May 27, 1850. On the 1st day of October, 1850, while the title to said lands was still in Gamaliel Perkins, said Martin B. Perkins (being then in the possession thereof) executed a mortgage of said lands to the loan commissioners of Washington county, for \$1000, for money then loaned him by said loan commissioners, which mortgage was in the usual form, and contained the following covenant: "And at the time of sealing and delivering of these presents, the said Martin B. Perkins, and Emily his wife, are lawfully seised of the above bargained premises, of a good, sure, perfect, absolute and indefeasible estate of inheritance, and the same now are free and clear of and from all former and other gifts, grants, bargains, sales, liens, judgments, recognizances, dowers, rights of dower and other incumbrances whatsoever; and also, that the above bargained premises, upon the sale thereof pursuant to the directions of the said act, will yield the principal and interest aforesaid remaining unpaid at the time of such sale, and until the first Tuesday of October next after such sale, together with the charges of such sale."

Annual interest was paid and indorsed upon said mortgage, regularly, up to and including October, 1866, and one payment of \$70 and interest was made and indorsed thereon, January 16, 1868.

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The mortgage, at the time it was executed, was duly entered, as at the date thereof, upon the said loan commissioners' books, kept and provided for that purpose, as required by the statute of 1837, and the amendments thereto, and the said books were duly deposited and kept in the office of the clerk of Washington county, and properly indexed as required by law. On the 23d day of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the county clerk's office, which deed purported to be executed by Martin B. Perkins and wife to Gamaliel Perkins. On the 16th day of December, 1859, Gamaliel Perkins conveyed said lands to Martin B. Perkins, by warranty deed, which deed was duly recorded January 14, 1860. Gamaliel Perkins held the title to said lands continuously, from the 18th day of January, 1848, to the 16th day of December, 1859, and he had no knowledge of the existence of the mortgage, or of any of the deeds to or from Martin B. Perkins, except the deed of December 16, 1859, and Martin B. Perkins had no title to said land until said 16th day of December, 1859. On the 31st day of January, 1867, Martin B. Perkins, who still remained in possession of said lands, sold and conveyed the same, by deed of warranty of that date, to the plaintiff, who paid full value therefor, and went into possession of the same, without having any actual notice or suspicion of the existence of said mortgage, or any notice of the same whatever, except such constructive notice as the law may have compelled him to take (if any) by reason of the recording thereof, as aforesaid; and the plaintiff has ever since remained in possession of said premises. Said deed to the plaintiff was duly recorded February 9, 1867. Whatever interest was paid on said mortgage, at any time, with the knowledge or assent of the plaintiff, was paid under protest of the plaintiff, and under an arrangement made by him with said loan commissioners, to the effect that the plaintiff should have time to investigate the mat-

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ter, and decide upon the course to be pursued by him, and that any payment of interest so made should not affect the plaintiff's rights, or operate to his prejudice.

On the 28th day of October, 1868, the loan commissioners of Washington county commenced a statute foreclosure of said mortgage by advertisement, and this action was brought to restrain said foreclosure, and to have said mortgage decreed void as against the plaintiff.

The court, after hearing the matter, dismissed the complaint, with costs, and awarded judgment accordingly. And the judge found the following conclusions of law:

1st. That by reason of the conveyance of the lands and premises to Martin B. Perkins, and of the covenants contained in the mortgage executed by him to the loan commissioners, such mortgage became operative as a mortgage upon said lands and premises, notwithstanding its execution prior to the time when he acquired title to the mortgaged property.

2d. That the plaintiff occupies no better position, as regards the mortgage or lien thereof upon the mortgaged property, than did his grantor, Martin B. Perkins.

3d. That the plaintiff is not entitled to the relief demanded in the complaint.

To each of these conclusions the plaintiff duly excepted. From the judgment entered upon these findings and conclusions, the plaintiff appealed to this court.

Boies & Thomas, for the plaintiff.

Potter, Tanner & Potter, for the defendants.

By the Court, P. POTTER, J. By the act of 1837, under which the mortgage in question was given, the books of the loan commissioners, kept in the clerks' offices, containing the entry of such mortgages, are made of the same effect, as to priority of liens, and as to their operation and

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effect, as if such mortgages had been duly recorded in the book of mortgages in the office of the county clerk of the county in which such mortgaged premises are situate.

By the recording act, (1 R. S. 756, § 1,) "every conveyance of real estate is required to be recorded in the office of the clerk of the county where such real estate shall be situated; and by the 38th section of the same act, the term 'conveyance' embraces every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity.

In various cases, found in the books, it has been held that the registry, and the recording, of a mortgage, under the provisions of the statutes making it a duty so to register or record them, is notice to all subsequent purchasers and mortgagees, of the lien created thereby. (*Frost v. Beekman*, 1 John. Ch. 298. *Parkist v. Alexander*, Id. 398, 399. *Johnson v. Stagg*, 2 John. 510. *Brinckerhof v. Lansing*, 4 John. Ch. 69. *Williams v. Birbeck*, 1 Hoffman's Ch. R. 369, &c.)

I think the case before us must be controlled by the effect of the covenants in the mortgage given to the defendants, and of the recording acts in this state. 1. The conveyance by mortgage to the defendants was with warranty, and covenant "that Martin B. Perkins and his wife were lawfully seised of the premises of a good, sure, perfect, absolute and indefeasible estate of inheritance, and that the same were free and clear of, and from, all former and other gifts, grants, bargains, sales, liens, judgments, recognizances, dower, rights of dower and other incumbrances whatsoever." Then the conceded rule of law is, that where a grantor, even has no title to the premises so conveyed with warranty, if he subsequently acquires an estate therein, such acquired estate will enure to the benefit of the grantee; if not by estoppel, it will upon the principle of avoiding circuity of action. Such a case is dis-

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tinguished from the ancient conveyance by feoffment with livery of seisin, now fallen into disuse in England, and not applicable here, under our system; so too it is distinguished from mere grants, by deeds poll and quit-claim. A mere grant operates upon the possession; it simply conveys the estate and interest which the grantor had in the premises granted. If the grantor had no estate, it is obvious that there was no estate to be accepted; so that in the conveyance by grant only of lands, by deed or mortgage, the grantee is not estopped to aver that his grantor had nothing in the lands granted. (*Sparrow v. Kingman*, 1 N. F. 252, &c.) But the rule is different where the conveyance is by warranty. As was said by Marcy, J., in *Jackson v. Bradford*, (4 Wend. 622,) "the warranty will rebut and bar the grantor and his heirs of a future right. This is not because a title ever passes by such a grant, but the principle of avoiding circuitry of action interposes and stops the grantor from impeaching a title to the soundness of which he must answer, on his warranty." (*Co. Litt.* 265, a. 14 *John.* 194. *Averill v. Wilson*, 4 Barb. 187.) This warranty in the mortgage clearly estopped the grantor, Martin B. Perkins; and if the grantor or any one claiming title from him, subsequent to such grant, seeks to recover the premises by virtue of such after-acquired title, the original grantee, or his heirs or assigns, by virtue of the warranty, may plead such warranty by way of rebuttal or estoppel, as a bar to the claim. (*Bank of Utica v. Mersereau*, 3 Barb. Ch. 567, 568.) Chancellor Walworth in that case said: "This principle has been applied to all suits brought by persons bound by the warranty, or estoppel, against the grantee or his heirs and assigns, so as to give the grantee and those claiming under him the same right to the premises, as if the subsequently acquired title or interest therein had been actually vested in the grantor at the time of the original conveyance from him with warranty, where the covenant of warranty was in full

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force at the time when such subsequent title was acquired by the grantor." And where an estoppel runs with the land, it operates upon the title so as actually to alter the interest in it in the hands of the heirs or assigns of the person bound by the estoppel, as well as in the hands of such person himself. (*Brown v. McCormick*, 6 *Watts*, 64. *Comstock v. Smith*, 13 *Pick.* 119.)

This principle seems to be founded in equity and justice, as well as in the policy of the law, and applies equally to a case of covenants of warranty in a mortgage, as to those in a deed absolute. This was so held in *Vanderheyden v. Crandall*, (2 *Denio*, 25; and see cases there cited.)

In this view of the case, the question is simple. The mortgage in question is an instrument within the recording acts. Although Martin B. Perkins, at the date of its execution, had no title to the premises, yet while he was in possession of them, and while his covenant of warranty was in full force, he became vested with the title in fee. This title enured to the benefit of the defendants by virtue of the warranty, by well established principles of common law. As between Martin B. Perkins and the defendants, this interest in the latter, in the lands, became as perfect as if the mortgage had been executed by Perkins after the date of his title. Did the defendants lose this interest, by Perkins' conveyance to the plaintiffs? I think not. The case of *The Bank of Utica v. Mersereau* (*supra*) decides this question. The cases that are cited, and claimed to be in conflict with this principle, are cases of mortgages, or of simple grants without covenants of warranty, or cases where the question of the effect of the covenant of warranty did not arise. Such are the cases of *Doyle v. The Peerless Petroleum Co.*, (44 *Barb.* 239,) and *The Farmers' Loan and Trust Co. v. Maltby*, (8 *Paige*, 361.) This last case is greatly relied upon by the plaintiff.

It is easily distinguished from the case before us, for other reasons. In that case, before the execution of the

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mortgage, (which is not shown to have contained covenants of warranty,) the mortgagor had sold the property by executory contracts, and the vendees were in the possession under their agreements at the time of execution of the mortgage, and had made payments thereon, thus having an equitable interest in the estate. Their grantor at the time of making the agreements not having the legal title, but having himself an equitable title under a contract to purchase, from the true owner, which he afterwards consummated by taking a deed, was the owner of an interest which he could alienate. The only question considered by the chancellor, in that case, was, whether the defendants should lose the payments they had made before they had notice of the plaintiff's mortgage. What the chancellor said in the case beyond that was *obiter*, and not an adjudication. That case has no application to the main question before us in this case upon its merits.

I am also inclined to think that the recording acts are controlling in favor of the defendant in this case, and that the judgment should be affirmed.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *Miller*,
P. Potter and *Parker*, Justices.]

RUE vs. PERRY.

A constable has such an interest in property upon which he has levied by virtue of executions, as will enable him to maintain an action to recover the possession thereof, from one who has purchased the same of the defendant in the executions, after levy.

The rule justifying an officer in the seizure of property under executions good on their face, but really void as to the party, for want of jurisdiction, is intended to be a rule of protection, merely.

Although the officer may *defend* under such process, he cannot build up a title upon it, so as to maintain actions against third persons.

A short summons can only be issued, by a justice of the peace, against defendants who come within the class of persons, who, by the non-imprisonment act of 1881, (3 R. S. p. 462, §§ 212 to 215, 5th ed.,) cannot be proceeded against by long summons or warrant. And that the defendant belongs to that class must be made to appear to the justice by affidavit.

A short summons is an extraordinary process, and can only issue on proper preliminary proof; and as no jurisdiction is obtained, without such proof, a judgment appearing to have been rendered by a justice of the peace without it, is to be presumed void, until the party upon whom the onus is shown supplies that proof.

A mere memorandum, "aff't, short summons," upon the justice's docket, does not furnish the evidence that the justice had jurisdiction; and if there be no appearance in the cause, by the defendant, there can be no waiver of the objection that the court has no jurisdiction.

In an action brought to recover the possession of property upon which the plaintiff had levied, as constable, under an execution issued by a justice of the peace, the plaintiff produced, upon the trial, the docket of the justice, which showed the issuing of a short summons against the defendant, returnable in three days, and returned duly served. All that appeared beyond this, on the docket, was "aff't, short summons issued." No affidavit was proved or produced. And the defendant did not appear, on the return day; but the plaintiff proceeded, in his absence, to obtain judgment, on an account. *Held* that the plaintiff failed to show jurisdiction, in the justice, to render the judgment; and that the judgment, so far as appeared from the proof on the trial, was clearly void.

But when the judgment was offered in evidence, the defendant's counsel not only permitted the docket to be read in evidence, without objection, but admitted it to be evidence. The question of the validity of the judgment was not raised, on the trial; and the judge's attention was not directed to any want of validity in it; nor was it made a matter of contest. *Held* that after judgment it was too late to raise the objection that jurisdiction in the justice was not proved. That at that stage of the cause, the objection was to be deemed waived.

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After judgment, a party will be presumed to have waived any objection that he might have taken, on the trial, but omitted to take.

THIS was an action, commenced by the plaintiff in a justice's court, to recover, by his title as constable, claiming it by virtue of a levy upon executions issued by justices of the peace, certain property which the defendant had purchased of one George W. Bishop, who was the defendant in the said executions. The property was purchased after the levy, but purchased from the defendant, who was in the possession, and without knowledge of the levy thereon by the plaintiff.

J. D. Wendell, for the plaintiff.

A. H. Ayres, for the defendant.

By the Court, P. POTTER, J. The plaintiff recovered the value of the property, before the justice, and the county court of Montgomery county affirmed the judgment. But this court is not informed upon what grounds it was affirmed, by any opinion given by the county judge; and we are therefore to look at the proceedings before the justice, to see what errors, if any, were committed by him. Four grounds of error are set forth in the notice of appeal, but only one of these demands consideration, to wit: "*Fourth*. The judgment was unsupported by evidence, in that the plaintiff did not show himself rightfully, nor even colorably, a constable; and in that the evidence of the larger judgment, through which the plaintiff claimed to make title, and which was held to be valid, did not show jurisdiction of the person of the defendant therein."

The plaintiff's complaint based his title to the property in question upon his special interest in the property as a constable, by virtue of a levy by executions issued upon two justices' judgments, setting forth the judgments and

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the executions issued thereon, and proving his levy. This was a sufficient interest to maintain an action. The executions upon which the plaintiff levied were good on their face, and would have justified the plaintiff in his action, had he been defendant and sued in trespass for taking it; even though the justices who issued them had no jurisdiction of the actions in which they were rendered. This is intended to be a rule of protection, but that is not the position of the plaintiff in this action. He is plaintiff, and attempts to build up a title upon judgments, by maintaining an action upon them, against a third person. Here the officer becomes the assaulting party. As was said by Bronson, J., in *Horton v. Hendershot*, (1 Hill, 119,) "this rule is intended for a shield, but not a sword." (*Dunlap v. Hunting*, 2 Denio, 645. *Earl v. Camp*, 16 Wend. 562.) The plaintiff fully established that he was a constable. Two judgments were shown; one of \$48.21, the other of \$7.50, upon which the executions were issued under which the plaintiff claims title. The smaller one, I think, was good, and full jurisdiction shown in the justice before whom the judgment was obtained. The only question that can be raised is as to the larger one. And as to this, the first question is, did the justice obtain jurisdiction of the defendant therein?

On the trial, the docket of the justice was introduced in evidence. The justice himself was not called. The docket showed that a short summons had been issued against the defendant, dated July 6, 1869, and returnable on the 9th of the same month, duly served. All that appeared, beyond this, on the docket, was "aff't, short summons issued." No affidavit was proved or produced. And the defendant therein named did not appear, on the return day, but the plaintiff proceeded to obtain judgment on an account. The plaintiff, I think, failed in this to show jurisdiction in the justice. A short summons can only be issued against defendants who come within that

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class of persons who, by the non-imprisonment act of 1831, now adopted as a part of the provisions in relation to justices' courts, (3 R. S. 462, §§ 212 to 215, 5th ed.,) cannot be proceeded against by long summons or warrant. And that a plaintiff brings himself within that provision must be made to appear to the justice, by affidavit. This short summons, therefore, is an extraordinary process, and can only issue on proper preliminary proof; and as no jurisdiction is obtained, without such proof, a judgment in this inferior court is to be presumed void, until the party upon whom the onus is thrown supplies that proof. The mere memorandum, "aff't, short summons," upon the justice's docket alone, does not furnish the evidence that the justice had jurisdiction; and as there was no appearance on the part of the defendant, there was no waiver of this objection.

The judgment, so far as the proof on the trial presented it, was clearly void. (*Kelly v. Archer*, 48 Barb. 68, 71. *Imbert v. Hallock*, 23 How. Pr. 460, and cases cited. *Barnes v. Harris*, 4 N. Y. 382.)

I am nevertheless of opinion that the judgment before us ought not to be reversed. When this judgment, now claimed to be void, was offered in evidence, the defendants' counsel, being present, not only permitted the docket to be read in evidence, without objection, but admitted it to be evidence. The question of the validity of the judgment was not raised, on the trial; the judge's attention was not directed to any want of validity in it; and it was not made a matter of contest. The court had a right to assume, and take for granted, by the conduct of the defendant and his counsel on the trial, that the justice before whom the judgment was obtained had jurisdiction of the case. It is to be presumed, after judgment, that if the objection had been taken at the proper time, the justice who tried the action, or the affidavit to which the docket refers, could have been produced, and the proper evidence

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been supplied. The justice who tried this action is to be presumed to have tried it upon the implied theory which the silence of the defendant must be regarded as conceding to be true, to wit, that there was no intent to take exception to the validity of this judgment. It is bad faith towards the party; it is unprofessional on the part of counsel; it is trifling with the courts, thus to prosecute or defend actions upon the basis of technicalities induced by bad faith; and courts should never give countenance to such practice. But it is sufficient, here, to put the case on the ground that the party is to be presumed, after judgment, to have waived any objection that he might have taken on the trial, but omitted to take. (*Austin v. Burns*, 16 Barb. 643. *Jenks v. Smith*, 1 N. Y. 94. *Duntz v. Duntz*, 44 Barb. 460. *Paige v. Fazackerly*, 36 id. 395.)

I think, therefore, the judgment should be affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *Müller*, P. Potter and Parker, Justices.]

THE PEOPLE OF THE STATE OF NEW YORK, THE PRESIDENT, MANAGERS and COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY and others, vs. SIMON SCHOONMAKER, SIMON P. KEATOR and SILAS SNYDER.

A leading and controlling rule in the construction of statutes is to interpret them according to the true meaning and intent. To ascertain this intent, it is the duty of the court to find by established rules what was the fair, natural and probable intent of the legislature.

For this purpose, the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly and distinctly the intent, according to the most natural import of the language, there is no occasion to look elsewhere.

But when the meaning of words is doubtful, and where it is seen that the same words have different meanings, when employed under different circumstances,

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or to effect different objects, resort may be had to extrinsic circumstances; and the courts may seek for that intent in every legitimate way.

A statute authorized commissioners, who were to be appointed for that purpose, to subscribe, in the corporate name of a town, to the capital stock of a railroad company, and to issue bonds in the name of the town, therefor; *Provided*, however, that "no subscriptions to stock shall be made, or bonds issued, until the consent in writing, specifying the amount of such subscription and bonds to be issued, be first obtained, of a majority of the tax-payers * * appearing on the last assessment roll of such village or town, representing a majority of the taxable property of the residents of said town," &c. *Held* that it was not the intent and meaning of the legislature, nor the spirit of the act, that a canal corporation owning property within the town, and paying taxes thereon, but whose principal office and place of business was elsewhere, should be included in the language of the statute—"the residents of said town."

Held, also, that this construction, flowing from the language of the statute, was confirmed by looking at the extrinsic circumstances existing at the time of, and prior to, its enactment, viz., the holding of a meeting by the resident tax-payers of the town, and the passing of a resolution to apply to the legislature for such a change of the law contained in a previous act, as would exclude this and other corporations from voting, or giving or refusing their consent to the issuing of such bonds; followed by the action of the legislature, in passing the act in question.

Although courts, in some cases, have held corporations to be *persons, inhabitants and residents*, yet this has been by construction, and for special purposes; such as to create an equality of liability to taxation, and to confer power to bring or institute actions, the same as citizens. And, for general purposes, and for other special purposes, they are held not to be residents. *Per POTTER, J.*

And, independent of the cases making them "inhabitants," and "residents," by construction, for certain purposes, the natural, ordinary and literal construction of the words "residents of a town," would not include corporations; especially those whose places of business were elsewhere.

The word "resident," occurring in the constitution, or in a statute, ordinarily means an individual—a citizen—and does not mean a corporation.

THIS action was brought to restrain the defendants, who are commissioners under the statute, from issuing town bonds of the town of Rosendale, Ulster county, in aid of the construction of the Wallkill Valley Railroad. The defendants were appointed commissioners of said town of Rosendale, under chapter 311 of the laws of 1868.

A temporary injunction was granted on the complaint

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alone, at the commencement of the action. The ground on which the plaintiffs claimed an injunction was, that the necessary number of consents had not been obtained to authorize the issue of bonds. The plaintiffs alleged that the Delaware and Hudson Canal Company, and one or two cement companies, were to be regarded as *residents* of the town of Rosendale, and that as such residents their consent was necessary to make up the proper amount of consents.

The complaint alleges that the Delaware and Hudson Canal Company owns real estate and a canal, in said town of Rosendale, and is taxed for the said real estate; and that these two facts make the corporation a legal resident of the town.

By section 3 of the act of April 22, 1868, (*Laws of 1868, vol. 1, p. 644*,) the commissioners appointed under said act are authorized "to subscribe, in the corporate name of such town, to the capital stock of the Wallkill Valley Railroad Company, and issue bonds for the payment of such stock to an amount not exceeding twenty per cent of the assessed valuation of the real and personal property of such town, appearing from the last assessment roll therein, * * * provided, however, that no subscription shall be made, or bonds issued as aforesaid, until the consent in writing, specifying the amount of such subscription, and bonds to be issued, be first obtained of a majority of the tax-payers, (or their legal representatives,) appearing on the last assessment roll of such village or town, representing a majority of the taxable property of the residents of said town, which consent shall be proved and acknowledged in the same manner as signatures to conveyances of real estate, and shall be filed and recorded in the clerk's office in the county in which the said town is situated." The section then provides that *when* these provisions are *all* complied with, the subscription to the stock can be made and the bonds issued.

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The complaint was not verified. The defendants' answer was verified. Upon this answer and various affidavits on the part of the defendants, a motion was made, before the same judge who granted the injunction, to vacate and set it aside, and the motion was granted. From this order the plaintiffs appealed to this court. All other material facts sufficiently appear in the opinion.

M. B. Champlain, (attorney general,) for the people.

T. R. Westbrook, for the other plaintiffs.

Schoonmaker & Hardenburgh, for the defendants.

By the Court, P. POTTER, J. The construction to be given to the act of the legislature of 1868, (*chap.* 311, § 3,) is really the only question in this case. None of the facts set up in the answer, or stated in the affidavits read on the motion, are controverted by the people, or the other plaintiffs in the action. Independent of the facts contained in the defendants' affidavits, and waiving the question whether the attorney general has authority to institute and maintain such an action, I am inclined to think that this motion can be determined by a reasonable interpretation of this special act of the legislature, enacted for a special purpose. A leading and controlling rule in the construction of statutes, as is conceded, is, to interpret them according to the true meaning and intent. To ascertain this intent, it is the duty of the court to find, by established rules, what was the fair, natural and probable intent of the legislature. For this purpose, the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly, clearly and distinctly, the intent, according to the most natural import of the language, there is no occasion to look elsewhere. (*McCluskey v. Cromwell*, 11 N. Y. 601.) But when

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the meaning of words is doubtful; and where it is seen that the same words have different meanings when employed under different circumstances, or to effect different objects, resort may be had to extrinsic circumstances. (*Smith v. Helmer*, 7 Barb. 416,) and the courts may seek for that intent in every legitimate way. (*McCluskey v. Cromwell*, supra.) And in *The Mohawk Bridge Co. v. Utica and Schenectady Railroad Co.*, (6 Paige, 561,) Chancellor Walworth said, the court could advert to facts of public notoriety, to enable them to understand the language used by the legislature. These simple rules will, I think, enable us to draw a reasonable conclusion as to what was the meaning and intent of the legislature in using the language in the act to be interpreted. (See also *United States v. Breed*, 1 Sumner, 159; *Heyden's case*, 3 Coke Rep. 7, b.; *Devonshire v. Lodge*, 7 Barn. & Cress. 39.)

The act in question was "to amend an act incorporating the Wallkill Valley Railroad Company, by authorizing said company to extend its road to Kingston, Ulster county, and to authorize certain towns in Ulster county to issue bonds to aid in the construction of said road." The act that was amended was passed in 1866, and the only portions of either act, requiring interpretation, is the restriction as to the description of persons whose consent was to be obtained, in order to give authority to issue such bonds. In the original act, the provision was in the following words:

"Provided, however, that the power and authority conferred by this section, shall only be exercised upon the condition that the consent of the *tax-payers of such towns*, their heirs or legal representatives, appearing upon the last assessment roll for the year 1865, *as shall represent a majority of the taxable property of such towns*," &c.

The supplemental act, passed April 24, 1868, (*Laws of 1868, ch. 311*), under which the defendants were appointed commissioners, is in the following words:

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"Provided, however, that no subscriptions to stock shall be made, or bonds issued as aforesaid, until *the consent* in writing, specifying the amount of such subscription and bonds to be issued, be first obtained *of a majority of the tax-payers* (or their legal representatives) *appearing on the last assessment roll of such village or town, representing a majority of the taxable property* of the residents of said town," &c. (§ 3.)

The last assessment roll of the town of Rosendale, referred to in said last statute, was that of 1867. The total valuation of the property of that town was \$463,798. The consent of admitted resident tax-payers, to the issuing of said bonds, represented property on the tax roll to the amount of \$121,448. Of admitted resident tax-payers who did not consent to the issuing of bonds represented property on said tax roll to the amount of \$68,890. The Delaware and Hudson Canal Company, who are tax-payers in said county, represented property on said tax roll to the amount of \$201,720.

It is therefore seen that this presents the simple question of construction, to wit: was the Delaware and Hudson Canal Company, in the contemplation of this statute, a *resident* of the town of Rosendale? If they were such residents, then the defendants, as commissioners, had no authority to issue the bonds referred to. If the Delaware and Hudson Canal Company were not, in the spirit and intent of this act, *residents* of said town, then the defendants seem to have been authorized to issue such bonds. This question of *residence*, then, is the real if not the only point in the case. Had the proceeding been under the act of 1866, the Delaware and Hudson Canal Company would be, clearly, included; and the valuation of their property would have been also included, because they were tax-payers, and their property was a part of the taxable property of said town. There can be no question as to this. They were not required by that act to be *residents*.

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But that act was not satisfactory, and was changed. How, then, does the act of 1868 change the law, and what was the legislative intent in changing it? It is to be presumed that they had some object in view; and it is absurd to assume that they made this change of phraseology, in the act, without intending some change in its effect. Certain deductions are clear from the language itself. The former act included all tax-payers; the latter does not. That was one change. So that, by the latter act, *certain* tax-payers were refused a voice, or a vote, upon the question of consent. Who were intended to be so excluded, or, in other words, who, only, by the latter act, could vote or give consent to the issuing of such bonds? The answer is first to be taken from the words of the act itself, viz., *the residents of the town*. Was it the meaning and intent of the legislature, and is it the spirit of the act, that the Delaware and Hudson Canal Company, a corporation whose principal office and place of business is in the city of New York, should be included in the language of this act—*the residents of the town of Rosendale*? Looking at the two acts, alone, I should think this corporation was not intended to be included in the latter act; and looking at the extrinsic circumstances existing at the time; at the meeting of the resident tax-payers of the town, in the fall of 1869; at their resolution to apply to the legislature for such a change of the law as would exclude this and other corporations from voting, or giving or refusing their consent to the issuing of such bonds; followed by the action of the legislature thereon, in the enactment of the latter act; the construction which would seem to be natural, from the language of the act alone, is confirmed by these circumstances. The gross and apparent injustice of creating a liability against this corporation and their property, without their consent, is a matter chargeable to the legislature, and not to the courts. It is quite probable that the project is not only against their consent, but against, and

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perhaps in depreciation of, their property that may be burthened to benefit others. And while we may see its injustice, it is our duty only to give construction to the law, not to make it.

It has been ably and elaborately argued that by analogy, and by reasonable construction, this corporation may be held to be residents of the town of Rosendale; and a very large number of cases are cited to show that the courts, in certain cases, have held corporations to be persons, inhabitants and residents. But this is by construction, and for specified purposes; such as to create an equality of liability to taxation, and to confer power to bring or institute actions, the same as citizens; but, for general purposes, and for other special purposes, they are held not to be residents. The taxing acts do not declare them to be residents, but in certain cases make them liable as residents. And while the word *resides* is of frequent occurrence, in the statute, when referring to individuals, it is not so used as applied to corporations. So, "taxable inhabitants" is the language applied to individuals, and not to corporations; and corporations are to be assessed by special provisions, and their names to be entered specially in the roll as directed by statute. And, independent of the cases cited, making them "inhabitants," and "residents," by construction, for certain purposes, the natural and ordinary, and literal construction of *residents of a town* would not include corporations; especially those whose places of business were elsewhere. (*See Webster's Dictionary.*) Besides, it may well be doubted whether an act limiting the description of persons who should be permitted to vote, or give consent to the issuing of bonds, and restricting those persons to residents of the town, would include corporations who cannot vote. The word "resident," occurring in the constitution, or in a statute, ordinarily means an individual—a citizen—and does not mean a corporation. In *Bank of the United States v. Deveaux*, (5 Cranch,

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90,) it was held by Chief Justice Marshall, that a corporation—a mere incorporated legal entity—is an invisible, intangible thing, yet, being composed of persons, for the purpose of bringing actions, is to be considered a person, and also for the purpose of jurisdiction. (*Stevens v. The Phoenix Ins. Co.*, 41 N. Y. 154. *Merrick v. Van Santvoord*, 34 *id.* 218.) To the same effect is *Rundle v. Delaware and Rar. Canal Co.*, (14 *How. U. S. R.* 80;) *Conroe v. Nat. Protec. Ins. Co.*, (10 *How. Pr.* 404.) And see *Crawford v. Wilson*, (4 *Barb.* 522,) as to residence, per Paige, J. For the purpose of bringing actions, they are residents in the county where their office is located. (10 *How. Pr.* 403, 404. *The People v. Pierce*, 31 *Barb.* 138.) So, too, are various cases holding that a person cannot have residence in two places. (*Houghton v. Ault*, 16 *How. Pr.* 77, 84. *Chaine v. Wilson*, *Id.* 552. *Kranshaar v. New Haven Steamboat Co.*, 7 *Rob.* 356.)

Another argument has been urged by the plaintiffs; that the intent of the legislature, in passing the act in question, is to be gathered from other acts *in pari materia*. Indeed both sides claim the benefit to be derived from this rule; the plaintiff, by claiming it to be a part of the taxing system, and to be interpreted as if incorporated among the laws, and the defendant, as a part of the system of laws for bonding towns to aid the construction of railroads. I do not think it can be classed with either. There is a rule that several acts *in pari materia* are to be taken together, and compared, in the construction of them, when they have one object in view, or are intended as a part of a whole system. This cannot be said of the act in question, upon either side. It is no part of our general system of taxation. True, it refers to the assessment roll, in order to get a basis of equality, or of representation in voting, but this is all its connection; a part of the taxable inhabitants are not included in it. Nor, in relation to the construction to be given to this special act, is it *in pari materia*

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with any other act. In a dozen acts enacted for such a purpose, to be found in the books, each will be found to be special and peculiar, and differing from almost every other. These acts are not one general system, but a special system for each corporation.

I am inclined to think the judge at special term, upon the papers before him, correctly vacated the injunction order, and that his order should be affirmed, with \$10 costs of the appeal.

Order affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *P. Potter and Parker, Justices.*]

JOHN HANSEE vs. MARGARET DE WITT.

The obligation of a married women, except in the cases where her separate property is involved, is void.

A married woman is not liable upon a promissory note signed by her as surety for another, or upon one given in renewal thereof; although she has a separate estate; where there is nothing to show a charge, or an intent to charge such estate, or that her estate was benefited, and no evidence (except by implication) to show that the note was given upon the credit of such estate.

THIS action was brought to recover the amount of a promissory note, executed and delivered by the defendant to the plaintiff.

The complaint alleged that the defendant was a married woman, the wife of Richard C. De Witt, and was, on the 12th day of November, 1867, the owner of a farm of land, and was carrying on business on her sole and separate account, in the town of Neversink, and as a part of her said business she executed and delivered to the plaintiff, on the said 12th day of November, 1867, her promissory note in writing, of which the following is a copy :

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"Ellenville, Nov. 12th, 1867.

\$571-¹⁷/₁₀₀. Three months after date, I promise to pay to the order of John Hansee five hundred and seventy-one 97-100 dollars, payable at the First National Bank of Ellenville, value received." (Signed by the defendant.)

The defendant, by her answer, admitted the giving of the note; and that she was a married woman, at the time of giving it; denied that it was given in relation to her separate estate, but alleged that she signed certain notes as surety for one Rhodes, for the purchase price of a pair of horses purchased by said Rhodes; that said horses were warranted; that the plaintiff purchased said notes, and afterwards there was a settlement of the matter; and that the note in this action was given for a less amount, to settle the matter and take up the former notes.

A. J. Bude, for the plaintiff.

A. J. Parker, for the defendant.

P. POTTER, J. The learned judge at the circuit ruled as a matter of law that the plaintiff was entitled to recover, and directed the jury to find a verdict for the amount of the note in question. In this ruling, and direction, with great deference, I think the learned judge erred. The note itself bears no evidence that the defendant charged, or intended to charge, her separate estate. And I think there was an entire absence of evidence, on the trial, that her separate estate was benefited by the consideration of this note; or, if there was evidence upon this point, then it became a question of fact for the jury, and the judge was in error in taking it from them. It did not help the plaintiff's case to prove, alone, that the defendant had a separate estate. Besides this fact, all that the plaintiff proved, having a tendency to show any benefit to the defendant, was his (the plaintiff's) own testimony, as fol-

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lows: "I brought two notes against her, from Moses Wolf, who got them from the vendor of the horses; one for \$300, the other for \$200. I believe she told me it was for a team of horses; it was for a team of horses bought by her and Rhodes. She came to me and said she wanted me to pay the notes, and she and her son Caleb would give me new notes." This was not accepted. "She then let me have a note of \$90, against N. C. Clark. We had some other deal, and I took a note of her for the balance. The last note ran along about four years, and was renewed." (Which is the note in suit, diminished only by what she had paid on it before renewal.) After the plaintiff got the notes, he testifies: "She came to me to go and get the horses from Rhodes, as, she said, she supposed she should have to pay for them." In all this there is not a word showing a charge made by the defendant upon her separate estate, or that such estate was benefited; nor any circumstance, except an opinion expressed by this defendant—a married woman—that she supposed she would have to pay for the horses. No other witness was sworn for the plaintiff, and no case was made against the defendant; but there was no motion for a nonsuit.

The only witness sworn on the part of the defendant was herself; who testified that she signed the first notes as security for Jonathan Rhodes, and did not buy the horses for herself; that the note in question was a second renewal of the first note she gave the plaintiff, (which first note was for renewal, in part, of the note she so signed as security for Rhodes.) She also testified, "that she renewed the notes because the plaintiff said they were in the bank, and had to be paid, and it would make trouble if I did not." Upon her cross-examination, she also said that about a year after giving the first note to the plaintiff, "she took the horses from Rhodes, and that she took them because she considered she was liable to pay for them."

This presents all the material testimony in the case, and

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in it no evidence appears, unless it be by implication, that the note was given upon the credit of her separate estate; none creating a charge upon it; none that her separate estate was benefited. Her opinion that she was legally liable to pay, and any action that was induced by the influence of that opinion, creates no liability. Not even the taking of the horses from Rhodes, afterwards, changed the nature of the contract with the plaintiff, or its consideration. The consideration of the note sued upon was the preceding note; and that, and those which preceded, until they came back to the note signed by her as the surety of Rhodes. There was no new or other consideration; and she being a married woman, her obligation (except in the cases where her separate property is involved) is void. This question has received so much consideration, recently, in the courts, that a discussion of the main point in the case is uncalled for. The legal incapacity of married women (except as to their separate estates, to charge them, or to create debts, or make contracts to benefit them,) is not now a question calling for the citation of authorities. The case before us is not brought within the exception. The burthen of showing this was on the plaintiff; he has failed to show it. The contract of a surety is *stricti juris*. But without invoking any technical rule, I think it is clear, upon well settled rules, that there was error at the trial, and the verdict should be set aside, and a new trial ordered; costs to abide the event.

PARKER, J., concurred.

MILLER, P. J., expressed no opinion.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, April 4, 1871. *Miller*,
P. Potter and *Parker*, Justices.]

SMITH vs. BORST.

In an action for a breach of warranty on the sale of a pair of horses, the warranty was shown to have been a qualified and conditional one, involving the necessity of the plaintiff's following the condition, viz., to treat the defect (a bunch on the leg) with salt and vinegar. *Held* that the plaintiff was bound so to treat it, and this was a good excuse for refusing to try another treatment, which might hazard the effect of the warranty.

And the plaintiff having proved that he called a horse farrier to examine the bunch, who gave him an opinion as to how he should treat it, the defendant, to show that the failure to cure the bunch was owing to the negligence of the plaintiff, proved by the farrier, on cross-examination, that the plaintiff did not pursue his advice, and for that reason no cure was effected. *Held* that, to rebut the effect of this evidence, it was not erroneous for the plaintiff to prove, by the farrier, that after he had told the plaintiff what course he should pursue, to effect a cure, the latter said he had no right to pursue that course; as he had been instructed, by the man of whom he bought the horse, to use salt and vinegar, to cure the bunch.

THIS was an action for a breach of warranty in the sale of a pair of horses, and was tried at the Schoharie circuit. All the questions that arise in the case are upon the rulings of the justice, in the admission or rejection of evidence on the trial. The exceptions were ordered to be heard, in the first instance, at the general term.

Mayham & Krum, for the plaintiff.

Hinman Brothers and N. C. Moak, for the defendant.

By the Court, P. POTTER, J. I have examined, with a good deal of care, the various exceptions taken to the ruling of the learned judge on the trial. They are numerous as is usual on the trial of a case of breach of warranty in a horse trade; and it may be stated, generally, that none of them possess such clear merit on the ground of error, as to demand a new trial. The strongest points urged by the appellant arose under the following circumstances. One of the breaches complained of was, upon the defendant's

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statement as to a swelling upon the leg of one of the horses, as follows: The defendant being called upon to say whether the horses were "all right," offered to warrant them so, but then drew the attention of the plaintiff to a bunch upon the leg of one of the horses. The plaintiff testifies: "I said if that's the case, I don't want her with a bunch on; defendant told me she hurt it the day before in the woods; then I told him if he would warrant her leg to get all right, or make it right; he told me he would warrant her leg to get all right, or he would make it right; make a fair recompense for it; he told me what to use on her leg; to use salt and vinegar." This testimony, if true, it is seen, created first, a general warranty; and a special warranty as to the bunch on the leg, qualified by a direction as to the means of curing this bunch. While treating this bunch, in the manner directed by the defendant, the plaintiff called a horse farrier to examine it, who gave him an opinion as to how he should treat this leg bunch. To show that the failure to cure this bunch, was owing to the negligence of the plaintiff, the defendant, on cross-examination of this farrier, proved that the plaintiff did not pursue his advice, and for that reason no cure was effected. To rebut the effect of this evidence, the plaintiff's counsel put this question to the witness: "What reason did he give for not adopting your treatment, on that day?" This was objected to by the defendant; the objection overruled; and an exception taken. The answer was: "After I told him what course I should pursue, he said he had no right to pursue that course; he had been instructed by the man he bought her of to use salt and vinegar, and in a few days it would all be gone." A motion was made to strike out this evidence; overruled, and the defendant excepted. Had this been affirmative evidence on the part of the plaintiff to prove the plaintiff's declarations, it would be clearly error. And I think it extremely doubtful whether, under any circum-

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stances, if it had been material, direct evidence, it could be justified. But in this case if any warranty was proved, as I think there was, it was a qualified and conditional warranty, involving the necessity of following the condition, to wit, to treat this defect with salt and vinegar, to effect a cure; he was bound so to treat it, and it was a good excuse, therefore, for not leaving off that treatment, and following another, which might hazard the effect of his warranty. His reply, therefore, was only saying what the law directed him to do; and as it was introduced to rebut the charge of negligence on his part, in not following the farrier's advice, which was urged against him, I do not think it error, under the circumstances. What he said was consistent with his legal duty under the warranty, and was the explanation of what otherwise might be charged as negligence. It was the defendant who, by his cross-examination, had placed him in the dilemma of making the explanation, and though no explanation was necessary or material, because the law made it for him, the testimony did no harm, and was immaterial. I regard this as the most material point raised in the case; and without discussing the others severally, I think judgment should be entered upon the verdict.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, September 5, 1871.
P. Potter and Parker, Justices.]

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SPRAGUE vs. MCKINZIE.

In January, 1845, the defendant wrongfully converted to his own use a mare belonging to the plaintiff, for which the latter then had a right of action, to recover from the defendant the value of the mare. In February, 1845, the defendant sold the mare to McK. In an action of trover, for the mare, the defendant offered to prove, in mitigation of damages, that soon after McK.'s purchase of the mare, the plaintiff, claiming her as his property, took her out of the possession of McK. without his consent, and converted her to his own use. This evidence, though objected to, was received. The court charged the jury that the taking back of the property by the plaintiff must go in mitigation of the damages; and that it was a case for nominal damages, only.

Held, 1. That the court erred in admitting the evidence offered in mitigation of damages.

2. That whether that were so, or not, there was error in charging the jury that it was a case for nominal damages; for if the plaintiff was not entitled to recover the full value of the mare, he was at least entitled to recover the actual damages he had sustained by being deprived of the use of her, and the expenses he had incurred in regaining his property.

The plaintiff offered to show that McK., the defendant's vendee, had sued him for his taking the mare by force, and recovered a judgment. *Held* that such evidence was erroneously excluded, as it would have overthrown every pretense of a defense, by the defendant.

ON the first day of March, 1845, the plaintiff commenced an action of trover, for a mare, against the defendant, before a justice of the peace; and on the 5th day of April, 1845, a judgment was given in favor of the plaintiff, for \$35 damages, and \$2.50 costs.

The defendant appealed to the court of common pleas, in the county of Essex, and upon the trial in that court, after the plaintiff had given such evidence of his title to the mare as he deemed sufficient, and proved, by Milton McKinder, that he, the witness, purchased the mare of the defendant in March or April, 1844, the defendant offered to prove, in mitigation of damages, that the plaintiff, soon after Milton McKinder had purchased the mare, claimed the mare as his property, and took her out of the possession of Milton McKinder, and converted her to his own use, without the consent of the said Milton. This evidence

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was objected to by the plaintiff, but his objection was overruled, and he excepted. The witness testified that the plaintiff, in company with another person, came to the witness' house, in February or March, 1844—soon after he had bought the mare of the defendant—and demanded the mare, and the witness refused to give her up. The plaintiff then asked if he might go to the barn to see the mare, and the witness went with him to the barn, and the plaintiff took the blanket and halter from the mare, and took her away, although he was forbidden to do so by the witness. After this evidence was admitted, the plaintiff offered to prove that the said witness commenced an action of trespass against him for taking away the said mare, and recovered, before the commencement of this suit. That evidence was objected to by the defendant's counsel, and excluded by the court, and the plaintiff's counsel excepted. The evidence being closed, the court charged the jury that the taking back the mare by the plaintiff must go in mitigation of the damages, and that the court considered it a case of nominal damages only. To which charge the counsel for the plaintiff excepted, and the jury gave a verdict in favor of the plaintiff for six and a quarter cents.

From the judgment entered upon the verdict, the plaintiff appealed.

J. P. Butler, for the appellant.

J. F. Havens, for the respondent.

By the Court, Cady, J. The first question is, did the court err in admitting the evidence on the part of the defendant in mitigation of damages?

On the 1st of January, 1845, the defendant wrongfully converted to his own use a gray mare belonging to the plaintiff, for which the plaintiff then had a right of action to recover from the defendant the value of the mare. That

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mare the defendant sold to Milton McKinder, in February, 1845, and the presumption is, that he received her full value. He did nothing between the time he converted the mare and the trial of the cause in the court of common pleas, in satisfaction of the plaintiff's demand against him; nor did the plaintiff do anything to the defendant to cancel the demand which he had for the conversion of the mare, but the plaintiff took the mare by force from the plaintiff's vendee; and that act, the court instructed the jury, reduced the plaintiff's demand to nominal damages. Had the defendant been compelled to repay to his vendee the value of the mare, in consequence of the plaintiff's having taken her, there would have been an apparent equity in confining the plaintiff's recovery to the actual, not to nominal damages; but there was no pretense on the part of the defendant that he had repaid to his vendee the money which he had received for the mare, or that he was liable to repay it, in consequence of the plaintiff having taken her.

The cases to which the counsel for the defendant has referred, in support of the ruling of the court, do not, in my opinion, show that the evidence offered by the defendant, and received by the court, was admissible.

The case of *Higgins v. Whitney*, (24 Wend. 379,) seems to be the most favorable to the defendant. In that case the defendant took the goods, believing them to be his, but in that he was mistaken. After he had failed to show that the goods were his, he offered to show that after he had taken the goods, they were taken from him, *without his consent*, by legal process, and applied in payment of a debt due from the plaintiff. That evidence was rejected by the municipal court in Brooklyn, and the Supreme Court held that that evidence ought to have been received. Justice Bronson, in giving the opinion of the court, in that case, said: "One who has wrongfully taken property cannot mitigate damages by showing that he has himself

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applied the property to the owner's own use, without his consent. (21 *Wend.* 394.) But when the property has been so applied, by the act of a third person, and the operation of law, that fact should be taken into the account in estimating the plaintiff's damages." In that case the property had been taken from the wrongdoer, and applied in payment of a debt due from the plaintiff. The defendant had gained nothing by his wrongful act, and to compel him to pay for property which had legally been applied in payment of the plaintiff's debt, would have had the appearance of great severity. Had the mare, in this case, been taken from the defendant by an execution against the plaintiff, without the defendant's consent, he might have relied upon the case of *Higgins v. Whitney*. But, instead of that, he sold the mare, and it must be taken for granted that he now has her value in his pocket, and wishes to retain it, and thus be benefited by his own wrongful act.

I am of opinion that the court erred in admitting the evidence offered by the defendant in mitigation of damages. But whether that be so or not, there was error in charging the jury that it was a case for nominal damages; for if the plaintiff was not entitled to recover the full value of the mare, he was at least entitled to recover the actual damages he had sustained by being deprived of the use of her, and the expenses he had incurred in regaining his property.

Suppose the plaintiff had been deprived of the use of his property for three months, and had been obliged to travel 200 miles to find it in the possession of the defendant's vendee, would nominal damages have satisfied his just and legal claim against the defendant? No sympathy ought to be indulged in favor of wrongdoers, at the expense of the injured party. Why was the evidence, offered by the defendant in mitigation of damages, received, but

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for the purpose of enabling him to retain the value of property which he had wrongfully converted?

If that evidence was admissible, it must have been upon the assumption that the plaintiff, by retaking his property, was fully indemnified, and made the plaintiff liable to pay his vendee for the property which the plaintiff had taken by force; but the plaintiff offered to show that the defendant's vendee had sued him and recovered for his taking the mare by force, and having recovered against the plaintiff he could have no claim against his vendor, the defendant.

I am of opinion that the evidence offered by the plaintiff was erroneously excluded. Although it is somewhat difficult to imagine how the defendant's vendee could recover against the plaintiff for taking his own property, yet such a recovery may have been had, and the plaintiff ought to have been allowed to prove it, if in his power, as it would have overthrown every pretense of a defense by the defendant.

The plaintiff had appealed from the judgment of a justice, and was entitled to have his cause tried in the court of common pleas.

The judgment of the court of common pleas must be reversed, and a new trial had *in the county court in the county of Essex.*

New trial granted.

[WASHINGTON GENERAL TERM, JANUARY 6, 1851. *Paige, Willard, Hand and Cady, Justices.*]

AARON ROGGEN *vs.* JOHN AVERY.

An instrument in writing, under hand and seal, but without a subscribing witness or acknowledgment, as required by the Revised Statutes, is insufficient to convey real estate, and void as against a purchaser or incumbrancer.

APPEAL, by the defendant, from a judgment entered at the circuit, upon the verdict of a jury. The opinion sets forth the material facts.

By the Court, P. POTTER, J. This was an action of ejectment, tried at the circuit in June, 1869, in which the plaintiff recovered a verdict for one undivided third of the premises claimed in the complaint.

The case is very voluminous, and many technical questions arise, but as the right of the plaintiff to recover depends chiefly upon the validity of a written instrument, it will only be necessary to pass upon that question, to determine the correctness of the verdict.

The plaintiff, by a deed of trust of June 1, 1844, held certain real and personal estate of his sister, then Mary Roggen, to her use, during her life, and at her death without issue, to pay over the same to her brother and sisters, three in number, of whom the plaintiff was one. Mary Roggen afterwards married Robert D. Howe, but died without issue. After her marriage, and on the 3d of August, 1860, she received a conveyance by deed, from one M. B. Matice, a referee appointed to sell real estate upon a judgment in the Supreme Court, for the consideration of \$500, of a parcel of land at Oak Hill, Greene county, containing half an acre, more or less. This lot, it appears, was purchased with the receipts of interest and income of the trust estate in the hands of her brother, the plaintiff.

On the 20th of May, 1862, the said Mary R. Howe executed, under her hand and seal, but without a subscribing witness or acknowledgment, an instrument reciting, among other things, that her brother, the plaintiff, had advanced

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to her, on mortgages in his hands as her trustee, certain moneys to purchase said Oak Hill property; and also that by signing the receipts for said money, she did not intend in any way to interfere with the moneys so held in trust for her, and expressing her wish and intention that the plaintiff should hold the deed in trust for her, as before; and concludes in these words: "And I, Mary R. Howe, do hereby assign, transfer and set over unto Aaron Roggen, my trustee, all my estate, both real and personal, of every kind and nature, for him to have and to hold the same under the trust deed given by me February 22, 1844; and it is my wish and desire to have the said trust deed carried out for the purposes therein contained, and in every respect."

The plaintiff's title depends upon this instrument being a conveyance to him of this Oak Hill lot, to hold as if it was a part and parcel of the trust deed of 1844.

The defendant claims title to the same premises, from the said Mary R. Howe; first, from her will, made in July, 1864, duly proved in September of the same year, by which she bequeaths all her property, of whatsoever name or nature, to her husband, Robert D. Howe. Second. On the 6th day of March, 1866, Robert D. Howe, by a warranty deed duly acknowledged and recorded, conveyed the said premises to John Avery, the defendant. This is the defendant's title.

The main question in the case, therefore, is, whether the instrument signed by Mary R. Howe, of the 20th of May, 1862, was sufficient to convey real estate. The complaint and answer, both, show the action to be one at law, strictly.

The Revised Statutes (*Vol. 1, Edm. ed., p. 148, § 150*) declare, that "every grant in fee, or of a freehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged previous to its de-

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livery, according to the provisions of the third chapter of this act, its execution and delivery shall be attested by at least one witness, or if not so attested, it shall not take effect, as against a purchaser or incumbrancer, until so acknowledged."

The plaintiff must rely upon his title, and not upon the weakness of the defendant's. It seems to me he failed to establish his title, on the trial. His deed fails to answer the requirements of the statute.

Without noticing the other questions in the case, the verdict should be set aside, and a new trial ordered; costs to abide the event.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, January 2, 1872. *Miller, Potter and Parker, Justices.*]

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CHARLES T. RICHARDSON, trustee &c., vs. WILLIAM W. PULVER and AMOS CASE.

In an action under the Code, to recover the possession of real estate, the plaintiff must (as in the former action of ejectment) recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary.

The act of April 11, 1849, (*Laws, ch. 375, § 3*), which provides that any married woman may convey real estate "in the same manner, and with the like effect, as if she were unmarried," repeals, as to married women and their separate estates, the provisions of the Revised Statutes requiring a private examination apart from their husbands, upon their acknowledgment of the execution of conveyances.

A married woman, therefore, having a power of appointment over lands of which the legal title is vested in a trustee, may execute an instrument desiring the trustee to execute a conveyance of the premises to her, in pursuance of a power contained in the trust deed; and may legally acknowledge the execution of such instrument in the usual form, without any private examination.

The validity of the execution of such a request to the trustee is to be tested by the form of acknowledgment at that time requisite, for married women. The claim that the acknowledgment of such an instrument should be in ac-

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cordance with the Revised Statutes is, at most, based upon an inchoate right, and the repealing statute is valid as against it. Inchoate rights, generally, derived under a statute, are lost by its repeal; unless saved by express words in the repealing statute.

THIS is an action of ejectment, to recover premises described in the complaint, situated in the city of Oswego. Trial by jury waived by consent of counsel in open court.

Robert H. Martin, by deed dated 10th December, 1845, and recorded March 6, 1856, conveyed the premises to Susan Martin. Susan Martin, by her deed dated 20th of December, 1845, conveyed the premises to Patrick H. Hard, with certain trust provisions, "for the benefit of Lucy W. Martin, the wife of Robert H. Martin," &c. Hard died 12th February, 1862. July 21, 1868, Lucy W. Martin presented her petition to, and an order was made by, the Supreme Court, appointing Charles T. Richardson, the plaintiff, a trustee instead of Hard, deceased, giving all the powers to said trustee that were possessed by Hard.

Lucy W. Martin had two children, viz., Cornelia W., born April 29, 1838, and Catherine, born July 11, 1840. Catherine married Delos Gary, May 5, 1858, and she died October 4, 1864, having had no child. Cornelia W. married the plaintiff, October 16, 1861, and is living and has children. Lucy W. Martin died April 19, 1870, leaving no will. This action was commenced February 16, 1871. In April, 1854, Robert H. Martin and wife executed a mortgage for \$1000 to Joseph M. Reneaux, on the premises. September 10, 1857, Robert H. Martin and wife executed a warranty deed of the premises, for \$800, to Delos Gary, which was recorded January, 1858. March 1, 1859, Delos W. Gary and wife executed a deed for \$1700 to John M. Courzon. April 15, 1859, John M. Courzon and wife executed and delivered a deed of the premises to William Pulver, one of the defendants. In 1858 Gary made improvements to, and placed betterments upon the premises. On the 26th day of July, 1856, Lucy W. Mar-

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tin, by an instrument in writing under seal, signed by her, "desired Hard to execute to her a conveyance of said premises in pursuance of a power in said trust deed contained, and in pursuance of the statute in such case made and provided." This instrument, on the same day, was acknowledged by her before an officer duly authorized to take acknowledgments of conveyances, who appended his certificate in the following words, to wit: "Oswego county, ss: On this 26th day of July, 1856, before me came Lucy W. Martin, wife of Robert H. Martin, to me known to be the person described in and who executed the above instrument, and acknowledged that she executed the same." Signed, "Charles Rhoades, commissioner of deeds." This instrument, so executed by her, was on the same day presented to Judge Allen, (then justice of the Supreme Court,) who made and delivered his certificate in these words and figures, to wit: "I have examined the condition and situation of the property referred to in the within instrument, and now held by the within Patrick H. Hard in trust for Mrs. Lucy W. Martin, and made due inquiry into the capacity of the said Mrs. Lucy W. Martin to manage and control the same, and in my opinion she is competent to manage and control the same, and that it is fit and proper that a conveyance should be executed as required. Dated July 26, 1856. W. F. Allen, Justice Sup. Court." On the 28th July, 1856, Patrick H. Hard, duly sealed and executed a conveyance of said premises, in pursuance of such request and certificate, to Lucy W. Martin, and on the 30th day of July, 1856, duly acknowledged said instrument, and the same was duly recorded August 13, 1856.

The defendant Pulver was a purchaser for value, without express notice of any defect in title; and the defendant Case is his tenant.

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C. T. Richardson and A. Perry, for the plaintiff.

W. A. Poucher and Henry A. Foster, for the defendants.

HARDIN, J. This being an action to recover possession of the premises described in the complaint, (like the former action of ejectment,) the plaintiff must recover, if at all, upon the strength of his own title, and cannot recover upon the weakness of that of his adversary. (*Davies, J., 3 Keyes, 627.*)

The important question, therefore, in this case is, whether the plaintiff, as trustee under the conveyance made by Susan Martin to Patrick H. Hard, had title to the premises at the time this action was commenced.

1. By the act of 1848, for the more effectual protection of the property of married women, and the act amending the same in 1849, (*Chap. 375*,) Lucy W. Martin was authorized to "take by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried."

2. The provisions of the deed to Hard authorized him "to convey said above granted and described premises to such person or persons as she, the said Lucy W., by an instrument in writing, under her hand and seal, *duly* acknowledged by her, shall constitute and appoint to receive such conveyance."

Assuming that the conveyance by Susan Martin to Hard, (as does the plaintiff, by seeking to maintain this action upon the legal title, 2 *N. Y.* 19; *Id.* 257,) vested a legal estate in the trustee, the question presented relates to the character and effect to be given to the instrument executed by Lucy W. Martin.

It is claimed that this instrument was not "duly ac-

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knowledge," and therefore the conveyance by the trustee unauthorized and invalid. But it appears that she executed and sealed the instrument, and then appeared before an officer authorized to take acknowledgments, and he made the usual certificate of her acknowledgment. Certainly, this acknowledgment was made in due form, unless it was at that time required to be separate and apart from her husband, and without fear or compulsion.

The act of 1849 expressly provides, that any married woman may convey real estate "in the same manner, and with the like effect, as if she were unmarried." This provision has been repeatedly held to repeal, as to married women and their separate estates, the provision of the Revised Statutes; and it seems now too late to question the correctness of that conclusion. (17 *Barb.* 660. 12 *How. Pr.* 441. 18 *N. Y.* 271. 26 *id.* 47.)

It was urged on the argument, that the instrument executed by Mrs. Martin, in 1856, must be in accordance with the law authorizing acknowledgments, as it stood in 1845; but no satisfactory reason was given why it was not competent to repeal or modify the statute as to acknowledgments, and as modified, why it should not be applicable to this instrument.

By section 34, 3 Revised Statutes 53, 5th edition, it is provided that "the acknowledgment of a married woman residing within this State, to a conveyance purporting to be executed by her, shall not be taken, unless, in addition to the requisites contained in the preceding section, she acknowledge, on a private examination apart from her husband, that she executed such conveyance freely, and without any fear or compulsion of her husband; nor shall any estate of any such married woman pass by any conveyance not so acknowledged." And section 70 of 3 Revised Statutes, page 59, 5th edition, defines the term conveyance as used in the first section quoted. By section 137 of 3 Revised Statutes, page 27, 5th edition, it was pro-

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vided "if a married woman execute a power by grant, the concurrence of her husband as a party shall not be requisite, but the grant shall not be a valid execution of the power unless it be acknowledged by her on a private examination, in the manner prescribed in the third chapter of this act, in relation to conveyances by married women."

These sections are deemed repealed or modified by the acts of 1848 and 1849, as to the execution by married women, so far as regards their separate estate; and as Judge Selden expresses it, in his opinion in *Wiles v. Peck*, (26 N. Y. 46, 47,) "it is too late, now, to question the correctness of that conclusion, involving, as it doubtless would, the validity of many titles."

The request to the trustee to convey, being in 1856, its execution is to be tested by the form of acknowledgment then requisite for married women.

The repeal or modification of those sections of the statute deprived the plaintiff of no right; it did not disturb or intermeddle with any vested interest or estate. (*The Firemen's Ins. Co. of Albany v. Bay*, 4 Barb. 407; *S. C.* 4 N. Y. 9.) It only regulated the manner in which the proof be given of an instrument affecting an interest in real estate. It only declared what should be deemed a due acknowledgment "within the statutory requirements." It affected the method of authentication of an instrument, rather than the legal effect thereof. It regulated the manner in which it should be acknowledged, so as to be placed upon record. (*McCotter v. Hooker*, 8 N. Y. 504.) The claim made by the plaintiff that the acknowledgment of the instrument by Mrs. Martin should be in accordance with the Revised Statutes, at most, is based upon an inchoate right, and the repealing statute is valid, as against it. (*The People ex rel. Fleming v. Livingston*, 6 Wend. 526.) "Inchoate rights, generally, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute."

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There is no such saving clause in the act of 1849. (*Butler v. Palmer*, 1 *Hill*, 324.) It follows, therefore, if the acknowledgment by Mrs. Martin was in accordance with the law regulating the acknowledgment of such instruments, in force in 1856, the date of her instrument, then it was in accordance with the trust deed to Hard, and the execution of the conveyance by him of the premises, in 1856, passed the title, and closed the trust; and the plaintiff, by the order appointing him, acquired no title to the premises, and therefore was not, at the commencement of this action, entitled to recover possession thereof.

Numerous other questions were discussed, upon the trial, which I do not deem it important to examine, as the result reached disposes of the plaintiff's right to recover in this action.

Complaint dismissed.

[OSWEGO SPECIAL TERM, January 8, 1872. *Hardin*, Justice.]

DOLAN vs. FAGAN.

In an action for assault and battery, the defendant offered to prove, in mitigation of damages, a series of provocations, repeated and continued from day to day; and that every time the parties met, the plaintiff took the occasion to insult the defendant with most approbrious language, and to such an extent as to render him wild, excited, frantic and partially insane. Also, that the plaintiff had committed a most grievous injury affecting the domestic relations of the defendant; which was one of the insults with which the latter was taunted. This evidence being objected to, the judge ruled that he would allow the defendant to show anything which took place on the day of the assault, or the day before, but not what took place several days before; as in that case the defendant had time for his passions to cool. *Held* that the ruling was erroneous; and a new trial was granted.

Where there has been a determined design to continue and repeat insults for the very purpose of exciting another, and to keep him excited, and this course of conduct is repeated every day, and on every occasion, the case is not to be controlled or limited by a few hours, or by a single day.

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Each case should be controlled by its own peculiar circumstances. The question should be, not how many hours have elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party has had a reasonable time to cool his blood.

If it was the plaintiff's design to provoke, excite, irritate and insult the defendant on every occasion of their meeting, and by a series of such irritating and annoying provocations, he kept the defendant in an excited and frantic state of mind, it is his own fault that the defendant was not cool.

The jury ought to be permitted to hear the nature and extent of the provocation; to hear and to know how much of the beating complained of, was, if not deserved, at least caused by the provocation given.

THIS is an appeal from a judgment rendered at the circuit, upon a verdict against the defendant in an action for assault and battery, on the ground of the exclusion of evidence on the part of the defendant, offered in mitigation of damages. Exceptions were taken, and judgment stayed, to have the exceptions heard, in the first instance, at the general term.

E. F. Terry, for the appellant.

Card & Brooks, for the respondent.

By the Court, P. POTTER, J. On the trial, the defendant offered to prove a series of provocations, repeated and continued from day to day; and that at every time the parties met, the plaintiff took occasion to insult the defendant with most approbrious language, and to such an extent, as stated in the proposition, as to render the defendant wild, excited, frantic and partially insane. This evidence was objected to by the plaintiff as immaterial, irrelevant and incompetent, and as too remote. The judge ruled that he would allow the defendant to show anything which took place on that day—the day of the assault—or the day before, but not what took place several days before; as the defendant had time for his passions to

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cool. This ruling was excepted to by the defendant. And this ruling is really the only question in the case.

The offers on the part of the defendant included, also, that of showing that the plaintiff had committed a most grievous injury affecting the domestic relations of the defendant, which was one of the insults with which the plaintiff taunted the defendant.

There was never any arbitrary rule, in the courts, fixing any precise period of time, by days or hours, by which to limit the time for the passions of a party to cool. Ordinarily, one day, sometimes a few hours, would be reasonably sufficient. And this reasonable time is the only rule ever established, or held, at the circuit. The passions may have had sufficient time to cool, perhaps, in one case, when the preceding insult was offered on but a single occasion, and yet not so in another case, where there had been a determined design to continue and repeat the insults for the very purpose of exciting another, and to keep him excited, and this course of conduct repeated every day, and on every occasion. It is not reasonable to suppose that such a case is to be controlled or limited by a few hours, or by a single day. The better rule would be, that each case should be controlled by its own peculiar circumstances. The question should be, not how many hours have elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party has had a reasonable time to cool his blood. For the purpose of determining this question, we have a right to assume that the defendant could have proved the provocation he proposed, by the evidence that was excluded—that it was the plaintiff's design to provoke, excite, irritate and insult the defendant on every occasion of their meeting. If this was the plaintiff's design—if, by a series of such irritating and annoying provocations, he kept the defendant in an excited and frantic state of mind—it was his own fault that the defendant was not cool. It is his

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own wrongful and irritating conduct that has brought upon himself a portion of the bruising and wounding he received. Having thus caused the violence, he ought not to be allowed the advantage of damages growing out of his own wrongful conduct. The jury ought to have been permitted to hear the nature and extent of the provocation; to hear and to know how much of the beating complained of was, if not deserved, at least caused by his provocation. In such actions, the amount of damages, in some degree, is made to depend, and justly so, upon circumstances of aggravation surrounding the case, upon the one side or the other. This principle of allowing the provocation of the plaintiff to be given in evidence, has been recently recognized in the courts as sound. In *Richardson v. Northrup*, (56 Barb. 109)—a general term case—the same principle was held in an action of slander. Such mitigating circumstances were allowed to be given in evidence where the provocation was repeated and continued down to the time of uttering the slanderous words. And, as was there said: "At each repetition, the provocation must necessarily become more annoying and exciting." See, also, a special term opinion in *Stellar v. Nellis*, (60 Barb. 524; S. C. 42 How. Pr. 164.)

I think the ruling was erroneous, and that the judgment should be reversed, and a new trial granted; costs to abide the event.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, March 5, 1872. *Miller*, P. Potter and Balcom, Justices.]

IN THE MATTER of the petition of FREDERICK O. NORTON *vs.* THE WALLKILL VALLEY RAILROAD COMPANY and others.

Where, in a proceeding under the general railroad act of 1850, as amended by the act of 1870, (*Laws of 1870. ch. 560, § 1.*) on the petition of a land owner for the appointment of commissioners to change the location of the route of a railroad as surveyed by the company, it appears by the testimony before the commissioners that the petitioner has failed to comply with the directions of the statute, by giving notice of the application for the appointment of commissioners, to an individual whose land, if the line of the railway be changed, as proposed by the petitioner, will be crossed and affected thereby, such proceeding is wholly void, and will be reversed, on appeal from the decision of the commissioners.

Where, according to the smallest estimate of the width required for the railroad, on the proposed route, it will take a portion of the land of an individual, and according to the largest estimate, it will take his dwelling-house; and, in any event, within six feet of his dwelling, there will be a railroad, over which he must pass to get to the highway; it cannot be said that such owner is not "affected by the proposed alteration," merely because the *center line* of the proposed railroad does not cross his land.

Such an owner comes within the purview, spirit, letter and intent of the statute which requires notice to be given the owners and occupants of lands to be affected by a proposed alteration of the route of a railroad.

The statute, in directing notice to be given to the owners or occupants of land to be affected by any one proposed change, clearly contemplates but one commission for that change, or proposed change; and, therefore, the greater necessity that its strict terms shall be complied with, so far as to allow all the persons to be affected by that line an equal opportunity to defend and protect their interests. *Per P. POTTER, J.*

THIS is an appeal in a proceeding under the statute of 1850, in relation to the location of the routes of railways, as amended by the laws of 1871, (*ch. 560.*) to change the location of the Wallkill Valley railway, as surveyed over the lands of Frederick O. Norton, George Coutant, and James Eltinge, in the town of Rosendale, Ulster county. Although not definitely stated in the petition of F. O. Norton, on which this proceeding is based, it subsequently appears by the map and testimony of the petitioner and others, before the commissioners, that the line of the rail-

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way as proposed to be changed by the petitioner, will pass upon and affect the land of one Garton Keator.

The petition set forth, among other things, that the land of the petitioner and the lands of George Contant and James Eltinge are the only lands, and they the only land owners, who are affected by the proposed change of location of the railroad.

T. R. Westbrook, for the appellants, the Wallkill Valley Railroad Company.

S. Hand, for the petitioner.

P. POTTER, J. The first real question in this case, in my opinion, is whether the petitioner instituted his proceedings in such form, as to confer jurisdiction upon the commissioners to be appointed. There is no doubt that the papers, in form, and upon their face, when presented to the court at special term, authorized the appointment of commissioners to examine the proposed route, for a change in the location of the defendants' railway, and would, *prima facie*, authorize the commissioners to affirm the original route, or to adopt the proposed alteration thereof. This being so, the *second* question that arises is, if after the appointment has been so made, it turns out in proof, before the commissioners, that the petitioner has failed to comply with the directions of the statute, by omitting to give notice to all the land owners affected, the proceeding is wholly void, or only voidable? And, *third*, if the proceeding is merely voidable, for the error so committed, is it not equally the duty of this court upon review, to reverse the proceeding?

In this case, the petitioner, by virtue of the provisions of section 22 of the general railroad act of 1850, as amended in 1871, (*ch.* 560,) is required, within 15 days after notice served on him by the defendant, of the location

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of their road over his lands, if he feels himself aggrieved by the proposed location, to make his application to the Supreme Court, for commissioners to examine the route. The statute requires that he should give a notice in writing, of such application, to the railroad company, *and to the owners and occupants of lands to be affected by the proposed alteration.* The petitioner represented to the court that only two persons, land owners, besides himself, were affected by the proposed alteration, to wit, George Contant and James Eltinge.

It turned out, in the testimony as it appears in the case, first, by a map conceded to be a correct representation of the two lines of the lands to be affected by the original, and the proposed change, made upon a scale of 100 feet to the inch; and also by the cross-examination of the petitioner himself, taken before the commissioners, that his proposed line would take lands of one Garton Keator, a land owner or occupant on that line, not mentioned in the petition; who did not join in the petition; and as to whom no evidence is found, in the case, that any notice of the application for the appointment of commissioners was served on him. The map shows that the *center line* of the *proposed* railroad ran within 12 feet of the lands of Garton Keator, and within 20 feet of his dwelling-house. If Keator is to be presumed to own the fee in one half of the highway opposite his lands, then the center line of the proposed road passes over lands to which he has title, subject to the easement of the public in the highway. There is no evidence in the case showing the width of the proposed railroad opposite the lands and house of Garton Keator; but it is shown by the map, and by the testimony of the petitioner, that the proposed line runs in the highway, at that point, which is, of itself, but about 40 feet wide. One witness makes it 25 feet wide. The map shows the proposed center line to be west of the center of the highway, and nearer than the center is to the lands

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of Keator, which are on the west side of the highway. The whole width of the proposed or changed railroad, at that point, must necessarily be taken from the highway and the lands of Garton Keator. Whatever quantity it takes from the highway so far reduces its width from the amount of 40 or 25 feet. The title of the lands occupied by the highway belongs to somebody. If we may presume, in the absence of evidence, that it belongs to the petitioner, whose lands lie on the east side of the highway, still the public have an interest in its not being reduced in width below 40 feet, lying, as it does, immediately by the side of a railroad. It is but in the spirit if not in the letter of this statute, that they are the owners or occupants of lands to be affected by this proposed road, and notice to the proper authorities who have it in charge would be but just.

But there is an entire absence of evidence, in the case, of the width of the proposed railroad, or changed line to be used for a railroad; and there is also an absence of evidence of the width necessary for its construction, except what is obtained from the testimony of the petitioner himself, which was as follows: "I think my line won't touch Keator's house, unless they take 66 feet; then it will. It is about 20 feet from the center line of the route I propose, to G. Keator's house; and if the line I propose was taken, it would take in Keator's house, the whole width of the highway, and does not interfere, between it and the railroad. It would not take the whole highway, running my route. It would take the whole of the highway from that point." This testimony is somewhat obscure, if not confused, but was obtained on his cross-examination. Then he was re-examined, and said: "I think the road (highway) is about 40 feet wide, near Mr. Keator's house. The proposed route *can be so laid* as not to take the house (Keator's.) The track is about 6 feet wide. I know about how wide railroad tracks are." Question.

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“Do you know about the width of the railroad tracks of this W. V. R. W.?” Answer. “About 6 feet for the single track; can’t say exactly about the space between the two tracks; should say about 5 or 6 feet. The actual line of the tracks, and the space intervening, would be about 18 feet, I think.”

Upon this evidence, alone, we are to judge of the width necessary to be used for the proposed road. If the space occupied by the two tracks should be six feet each, and six feet between them, making eighteen feet, then outwardly, from the outer track of each, three feet more, at least, is demanded, if the road is upon grade; making twenty-four feet, the least width which is absolutely required and necessary. If embankment or excavation is required, of which the case does not inform us, then as much more width must be allowed for slopes as is needed. Be this as it may, whether thirty-three feet is demanded on the west side of this proposed *center line*, or but twelve feet besides the slopes, it takes a portion of the land of Garton Keator; and if the widest allowance, then it takes his dwelling. In any event, within six feet of his dwelling is to be a railroad, over which he must pass, to get to the highway. To say that he is not *affected by this proposed alteration*, because the center line of the proposed railroad does not cross his land, would be doing violence to plain common sense. I think he comes within the purview, spirit, letter and intent of the statute which requires notice to the owners and occupants of lands to be affected by a proposed alteration of the railroad. This has not been given to Keator. The statute, in directing notice to be given to the owners or occupants of land to be affected by any one proposed change, clearly contemplates but one commission for that change, or proposed change; and therefore the greater necessity that its strict terms shall be complied with, so far as to allow all the persons to be affected by that line an equal opportunity to defend and

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protect their interests. We can hardly conceive of a case more directly affecting a person's property than that of having a railroad constructed up to the door of his house; if not indeed taking the house itself, and thus throwing, perhaps, an embankment or excavation between him and the highway. If we sustain this report, we sanction this injustice, without giving an injured party his day in court. This the statute never intended; much less, the constitution.

I do not choose to place this decision on the ground of the omission to serve notice on the commissioners of highways, or on any representative of the public who have rights in the highway. Nor do I intend to hold to the particular limit to which land owners may be affected. There are doubtless remote and collateral interests of land owners that are affected by every location of a road, and by every change of such road—such as that of increasing or diminishing their values. Such cases, where no portion of the property is taken, cannot be supposed to be within the contemplation of the statute in question. The burden of proof, in this case, was upon the petitioner. His rights to a change in the location were put upon the condition that the parties to be affected should have an equal right with himself to be notified, and to appear before the commissioners, to defend their interests. This has not been done, if we judge by the case as presented. If we are right in this view, then it is not important to review the decisions of the commissioners in admitting or rejecting evidence on the hearing; nor whether the weight of evidence was with or against the report they made. They were intelligent men, and seem to have acted conscientiously and fairly. But they could only act between the parties to the proceeding. The railroad company had a right to demand a compliance with the statute, before they could be compelled to change their route. This proposed

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change brought Mr. Keator in to be negotiated with, and they put themselves upon the statute.

The result is, the proceeding must be reversed.

BALCOM, J. I concur in the conclusion arrived at by brother POTTER, for these reasons, viz: 1. Jurisdiction was not conferred on the commissioners, because notice was not given to Keator. 2. The commissioners erred in rejecting evidence offered by the Wallkill Valley Railroad Company. (*See case, folios 51, 52, 53 and 56.*)

MILLER, P. J. I am inclined to think that notice will be presumed within the case of *Wood v. Morehouse* (45 N. Y. 368;) and that the evidence offered by the defendants was not material; for if the evidence had been given, it would not operate as an estoppel.

Proceedings reversed.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, March 5, 1872. *Miller, P. Potter and Balcom*, Justices.]

THE PEOPLE, *ex rel.* Helen R. Pitts, *vs.* THE BOARD OF
SUPERVISORS OF ULSTER COUNTY.

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Retrospective statutes are not forbidden by the constitution, in cases in which they do not impair the obligation of contracts, or partake of the character of *ex post facto* laws; and such statutes may be made, by express language, to have that effect. Yet, unless they are so expressed, by necessary implication, they will be interpreted otherwise, and so that they shall not operate to change the existing state of things, or the common law.

The only exception to this rule is, that the doctrine does not apply to remedial statutes; which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and are in furtherance of the remedy, and add to the means of enforcing existing obligations.

Even remedial statutes are not excepted from the general rule, except in those

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cases where no other construction can be given without leaving the enactment of no effect; or where such a retrospective construction is a necessary implication from the language employed.

By an act of the legislature passed in April, 1871, (*Laws of 1871, ch. 695, § 5*), the board of supervisors of any county in the state, (except New York and Kings,) were authorized by a two-thirds vote, to legalize the irregular acts of any town officer, performed in good faith, and within the scope of his authority; provided such legalization should be recommended by the county court of such county, and to correct any manifest clerical or other error in any assessments or returns made by any town officer to such board of supervisors, &c. In this case, the county judge of Ulster county, assuming to act under this statute, recommended that the taxes which had been assessed against the relator for the years 1866, 1867 and 1868, be refunded to her, and made an order to that effect. The board of supervisors refused to refund or allow such taxes. *Held* that the statute in question was to be held as *prospective* only; and did not have a retro-active effect, so as to include taxes assessed prior to its passage. Order granting peremptory mandamus reversed.

APPEAL from an order made at a special term, granting a peremptory mandamus, directing the defendants to refund to the relator her taxes, of the years 1866, 1867 and 1868, which were directed or recommended by the county judge of the county of Ulster, under the statute of 1871.

S. Hand, for the appellant.

M. Schoonmaker, for the respondent.

By the Court, P. POTTER, J. This proceeding originated under the act of the legislature of 1871, chapter 695, entitled "An act to amend an act entitled, 'an act to extend the powers of boards of supervisors, except in the counties of New York and Kings,' passed May 11, 1869."

By the 5th section of this act, as amended, the board of supervisors of any county (except the counties of New York and Kings) are authorized by a vote of two-thirds of all the members, to legalize the irregular acts of any town officer, performed in good faith, and within the

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scope of his authority; provided such legalization shall be recommended by the county court of such county, and to correct any manifest clerical or other error in any assessments or returns made by any town officer to such board of supervisors, which shall properly come before such board for their action, confirmation or review. The county judge, in this case, recommended these three years' taxes to be refunded to the relator, and made an order to that effect. The board of supervisors refused to refund or allow such taxes. The relator applied to the Supreme Court, at special term, for a mandamus to compel their payment, and the special term granted a peremptory mandamus, by order; from which order the present appeal was taken, to this court.

The defendants claim that the statute in question is only prospective, in effect; that it does not have a retro-active effect, so as to include the taxes in question.

We have looked at the adjudications of the courts upon the interpretation to be given to the statute in question. There is nothing in the terms of the statute itself which necessarily makes it retro-active in effect. The case, therefore, depends entirely upon the rule of construction to be applied to it.

In the matter of *The Oliver Lee Bank*, (21 N. Y. 12,) the court recognize the rule of construction laid down in *Dash v. Van Kleeck*, (7 John. 477,) to be the true rule. They say, by that and other cases, the courts are admonished to avoid, *if possible*, such an interpretation as would give a statute a retrospective operation. The rule as laid down by Kent, Ch. J., in *Dash v. Van Kleeck*, (7 John. 582, 583,) is as follows: "We are to presume, out of respect to the law-givers, that the statute was not meant to operate retrospectively; and if we call to our attention the general sense of mankind on the subject of retrospective laws, it will afford us the best reason to conclude that the legislature did not intend to set so pernicious an example."

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He further adds, that this has become a "principle venerable for its antiquity and the universality of its sanction, and is acknowledged as an element of jurisprudence." And also, that "this is a principle of the English common law as ancient as the common law itself; and that a statute even of its omnipotent parliament is not to have a retrospective effect;" and he cites *Bracton*, lib. 4, f. 228, and *Coke's Inst.* 292.

This rule was applied to a case of mandamus against *The Board of Supervisors of Columbia County*, (10 *Wend.* 365,) where Chief Justice Savage said: "The Revised Statutes, like all others, are prospective and so are to be construed, *unless otherwise expressed*, or *unless they cannot have the intended operation by any other than a retrospective construction*." (See 12 *Wend.* 490; 3 *Barb.* 306.)

Among other provisions of the Revised Statutes was a new one applying to justices' courts, &c., as follows: "Every judgment of which a transcript *shall be filed* and docketed as herein directed, may be reviewed by *scire facias*," &c. This was held not to apply to judgments entered prior to 1830. *Johnson v. Burrell*, (2 *Hill*, 239.) Cowen, J., said, in that case, "It is a general rule that a statute, affecting rights and liabilities, should not be so construed as to act upon those already existing. To give it that effect, the statute should, *in terms*, declare an intention so to act. Here it does not, but the language is prospective." (See 1 *Hill*, 335.)

Retrospective statutes are not forbidden by the constitution, in cases in which they do not impair the obligation of contracts, or partake of the character of *ex post facto* laws; and such statutes may be made, by express language, to have that effect. Yet unless they are so expressed, by necessary implication, they will be interpreted otherwise, and so that they shall not operate to change the existing state of things, or the common law.

The only exception to this rule is that referred to by

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Chancellor Kent, (1 *Com.* 455, 2d ed.,) in which he says: "But this doctrine is not understood to apply to remedial statutes, *which may be of a retrospective nature*, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, and adding to the means of enforcing existing obligations." As authority for this exception, he cites *Underwood v. Lilly*, (10 *Serg. & Rawle*, 101;) *State v. Stooltzfoos*, (16 *id.* 35;) *Bleakley v. F. and M. Bank*, (17 *id.* 64;) *Foster v. Essex Bank*, (16 *Mass.* 245;) *Locke v. Dane*, (9 *id.* 360.) I have taken occasion to examine these several cases, in their order. The case of *Underwood v. Lilly*, is the case of a statute *confirming* judgments entered up under a defective statute. Duncan, J., said: "Such an act impaired no contract—disturbed no vested right—and was free from the odium to which retrospective acts are generally subject." And he added: "Confirming acts are, in their very nature, and must be, retrospective; the words will admit of no other meaning." The case of *State v. Stooltzfoos*, was the interpretation of an act to *confirm* defective acknowledgments of deeds, decided by the same judge, and upon the same reasons—that it was intended, from its very nature, to apply to past acts, and that unless it was so interpreted, the act would be without force. *Bleakley v. Farmers and Mechanics' Bank*, was the construction of an act providing for the closing of banking institutions, extending the time of their corporate existence, and ratifying certain acts which they had no power to perform. The court say: "This law divests no right, but removes an impediment or disability; it renders lawful an act prohibited, as if it had been lawful *ab initio*; it works no injustice, infringes no man's rights; it impairs no contract," &c. The case of *Foster v. Essex Bank*, in Massachusetts, is, in all its legal features, like the preceding case in Pennsylvania. It was held that such a law was within the constitutional power of the legisla-

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ture, and though remedial and retrospective in one sense, it was not retrospective in the proper sense; for it provided for a future existence, and confirmed the acts of the corporation by providing a remedy for correcting mistakes, in furtherance of justice. The case of *Locke v. Dane*, was also that of an act to *confirm* the doings of certain courts, and other public bodies, and must, from its terms, refer to retrospective acts.

In all such cases, the acts must, of necessity, be interpreted retrospectively. But upon the authority of the cases cited, in this State and in England, unless the act contains, in terms or by necessary implication, language of intent to apply retrospectively, must be held to apply prospectively, only.

It thus appears, from the cases reviewed, that even remedial statutes are not excepted from the general rule, except in those cases where no other construction can be given without leaving the enactment of no effect; or where such a retrospective construction is a necessary implication from the language employed. This is not such a case.

In view of the cases examined, and the universality of the principle settled by the courts, I think the act in question is to be held as prospective only; and that the order of the special term must be reversed, with \$10 costs, and the motion before the special term denied, with \$10 costs.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, March 5, 1872. *Miller*,
P. Potter and *Balcom*, Justices.]

SAMUEL E. LYON *vs.* ROBERT ADDE.THE SAME *vs.* RANDALL A. BROWN.

In the case of an obligation which can be extinguished by an act *in pais*—such as payment—there is an absolute presumption of payment, after the lapse of twenty years. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made, within the period of twenty years.

There is also another presumption—a presumption of fact, or more properly, in the nature of evidence—which can be drawn by a jury from the circumstances of the case, *in less than twenty years*.

But when the obligation can be extinguished only by deed, the rule is different. In that case, there is no presumption of law at all; but there is the same presumption, in the nature of evidence, as in the other cases.

It is a presumption to be drawn from all the circumstances of the case; but mere length of time, by itself, will never raise it. That one circumstance, of itself, is insufficient; but it is a circumstance from which, in connection with other circumstances, the satisfaction of the obligation may be found by a jury, or decreed by a court of chancery.

At law, if there has not been a verdict, the issues are sent back, to be tried before a jury. In chancery, the presumption is drawn by the court, from all the circumstances of the case, as it would be by a jury; and not as a presumption of law.

When the relation of landlord and tenant has once been established, under a sealed lease, the mere circumstance that the landlord has not demanded the rent, cannot justify the presumption that he has extinguished the right to it by a conveyance.

As to the nature of the relations created by indentures of lease of lands, in fee, in the manor of Rensselaerwyck, that cannot be deemed an open question, in this State. It has been settled, by numerous adjudications upon the Van Rensselaer leases, in the Court of Appeals; where it has been held that such instruments are deeds of assignment, leaving no estate, reversion or possibility of reverter in the grantor; and not creating a *rent service*. But they do create a *rent charge*, which is properly styled *rent*. *Per* P. POTTER, J.

They create the relation of landlord and tenant; and the grantor's interest is an hereditament, descendible and hereditary.

It follows, that any release of the rent must be by deed; and that there can be no presumption of payment, arising from lapse of time.

The statement to the contrary, in *Lyon v. Chase*, (51 Barb. 14,) disapproved.

That case, standing alone, as authority to the point that "there would seem to be no distinction between the covenants in this instrument and other sealed instruments," should not be followed; especially in cases where the grantees of the estate have accepted their conveyances "*subject to the rents in the orig-*

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inal conveyance; which amounts to an implied covenant to pay, added to the proof, or admission, that such rent had not been paid.

Courts can draw no conclusion of *law* from the lapse of *time* during which rent has remained unpaid; but any presumption which they may raise must be drawn from all the facts and circumstances of the case as evidence, in the same manner in which a jury would draw inferences of fact.

Where premises were conveyed to the defendant by C., *subject to the rents then due, and to become due, to Stephen Van Rensselaer and his heirs and assigns*; *Held* that by receiving his title subject to these rents, the defendant was estopped from denying that they were then subsisting liens upon the premises, and that the covenants to pay them were then in force.

But that if that were not so, there was at least an explicit admission, in writing, by C., his grantor, of the subsistence of the covenant; and that, by all the authorities, was sufficient to rebut the presumption of extinguishment; even as against a presumption of law.

The defendant, by the deed from C., acquired only an estate *in remainder*, subject to a life estate in M.; and that life estate was conveyed to him, in 1850, by a deed, *subject to the same conditions*. *Held* that by the ordinary rule, the payment of the rents would be charged upon the tenant for life, and therefore the defendant did not become obligated to pay them, until he received his deed from M. in 1850.

Held, also, that the lapse of time from which a presumption of payment could be drawn must date either from C.'s deed, which was less than twenty years; or from M.'s deed, which was but twelve years. And that neither was sufficient, without other special circumstances.

It was claimed by the plaintiff that any presumption of a release was rebutted by proof to the contrary; while the defendant insisted that the presumption did not in the least depend upon the truth of the matter. *Held* that the court would neither throw the fact that no release had been given, out of the account, nor allow it to be conclusive, in rebutting the presumption. That that fact might well be important in discovering the releasor's intention; and that the court ought to require a greater lapse of time, and more unequivocal acts, to establish the presumption, than if it were in doubt as to whether a release had been given in fact.

Held, also, that if the case were examined upon the theory of a presumption of fact, even with the proof that no rent had been claimed, but with proof to a degree of certainty, that no release had ever been given, there was sufficient in the case to warrant a finding of the referee against the presumption of a release, and to justify the court in holding that no such presumption arose from twenty-five years' lapse of time. And that the case was easily distinguishable from the cases where a presumption has been held to arise from the peculiar and special circumstances upon which the presumption might be sustained.

In an action to recover rent reserved in an indenture of lease executed in 1794 to Abner Bull, it appeared that in 1817, and previously, the premises owned

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by the defendant were part of a farm known in the neighborhood as the "Abner Bull farm," and were so called by a witness who, in 1817, conveyed to the defendant's grantor. *Held* that this was a sufficient identification of the premises; that the Abner Bull who owned the farm at so early a day, and so near the date of the grant, would be presumed to be the grantee in the indenture; and in the absence of proof that he owned two farms, that the one called by his name would be presumed to be the same one conveyed to him by the indenture.

Where an indenture of lease appeared, by its date, to be seventy-seven years old, at the time of the trial; and its existence was traced back for over twenty-five years; and during that time it appeared to have been in the possession of the grantor's devisee and his assigns, who were its proper owners; and in addition to this, it appeared from the presumption drawn from the evidence of a former owner, that the grantee under the indenture owned the premises conveyed by it; *it was held* that this was sufficient to render the indenture admissible in evidence, without proof of possession under it.

And that the indenture, if admissible, proved the seisin of the grantor, at the time of its date.

A PPEALS by the defendants from judgments entered upon the reports of referees.

The actions were brought to recover rent upon lands alleged to be held under two indentures, by which Stephen Van Rensselaer had granted, bargained, sold, released and confirmed the premises in question, "to have and to hold the same" unto the grantees therein, their heirs and assigns forever, the said grantees, their "heirs and assigns, yielding and paying therefor, yearly, unto the said Van Rensselaer, his heirs and assigns," a rent certain; "which said rent the said" grantees did in and by the said indenture, for themselves, their "heirs, executors, administrators and assigns, covenant, promise and agree well and truly to pay to the said Stephen Van Rensselaer, his heirs and assigns, at the days and place, and in the manner above specified."

The grantee in the case first above entitled was one Young. The indenture was executed on the 22d day of August, 1805, and the defendant obtained title to said premises on the 19th day of October, 1842, by deed referring to said lease and expressed to be subject to the pay-

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ment of the rents due and to become due to the said Stephen Van Rensselaer, his heirs, assigns and representatives. The defendant's title was, however, subject to a life estate in one Merchant, which was extinguished in 1850 by a deed from said Merchant to the defendant, conveying Merchant's interest subject to the payment of the said rents, precisely as in the deed from Cole to the defendant. It does not appear that any rent had ever been paid upon this indenture. It did appear, however, affirmatively, that none had been paid between 1811 and 1844, and that none had ever been paid by the defendant, or demanded of him. It also appeared, affirmatively, that no release or discharge of the said rent had been given from 1839, down to the commencement of the action.

The grantee in the action secondly above entitled was one Abner Bull, and the indenture was executed on the 11th day of March, 1794. In 1817, one Edward Carr conveyed to one Peleg Carr the premises now owned by the defendant, subject to a rent certain to Van Rensselaer. These premises were a part of what was then, and for a long time had been, known as the "Abner Bull farm;" but there was no other evidence of its identification with the premises described in the indenture, except the fact that both were situated in the same township. In 1839 Peleg Carr and wife, by a conveyance upon the back of the former deed, granted to the defendant all their "right, title, interest, possession, dower, claim and demand, to the within lands, tenements, hereditaments and premises, as fully and amply as we hold the same." It did not appear that any rent had ever been paid upon this indenture; but it did appear, affirmatively, that no rent had ever been paid by the defendant, and that none had ever been demanded of him. It also appeared, affirmatively, that no release, or discharge, of the rent had been given since 1839.

The interest of Van Rensselaer in both these indentures,

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and the rents accrued upon them, and unpaid, had passed to the plaintiff before the bringing of the actions.

Other facts will appear in the opinion. This, it seems, was the second trial, in both actions. Upon the former trial, the plaintiffs had judgment, which was reversed by the general term. (*See Lyon v. Chase*, 51 Barb. 13.) That case and the present ones have been decided upon the same opinion on the second trial. The referee now reported in favor of the plaintiff, in both cases, and the defendants brought these appeals.

W. A. Beach and *E. Cowen*, for the plaintiffs.

A. Bingham, for the defendants.

By the Court, P. POTTER, J. These cases were formerly before this court upon the following statement of facts: "During all the time in which the defendant had been an owner of, or connected with, the premises, from 1842 down, no rent on the said indenture had been *claimed*, or paid by the defendant, or his co-tenants. That this suit was commenced on the 12th day of May, 1864." And upon this, the late general term in the third district held, *that there must be the presumption of a release*. (*See Lyon v. Chase*, 51 Barb. 14.) Upon the opinion in which case this suit was then decided by the general term.

The difference between that state of facts, and those which now appear, is in the want of proof that no rent has been claimed; in the proof that there has in fact been no release; and, in the first of the above entitled cases, there is a difference in the diminished time between the deed to the defendant and the beginning of the action, from that during which the rent appeared to have been unpaid, upon the former appeal; and also in the effect of the deeds to the defendant.

The last consideration (if the case was correctly decided before) may be important. If, by taking his title to the premises subject to the payment of the rents secured by

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this indenture, the defendant is estopped from denying that those rents were valid claims upon the premises, then it becomes entirely immaterial whether the rule to be applied in this case is that as to the presumption of the payment of an instrument of *debt*, or, that as to the presumption of a *release* of rent, from *landlord to tenant*; because the period prior to the commencement of this action was less than twenty years.

But if no such estoppel was effected by the conveyance to the defendant, then other and different questions will arise. It will be necessary to ascertain whether the rule as to the presumption of payment of an instrument of *debt* is to be applied; and if not, whether there is here a valid presumption of a *release*; and if so, whether proof that no release has, in fact, been executed is sufficient to rebut that presumption.

As these questions will *necessarily* arise in the second of the above cases, I will therefore examine them first.

The difference as to the rules of presumption, as I understand it, is this. In the case of an obligation which can be extinguished by an act *in pais*—such as payment—there is an absolute presumption of payment, after twenty years. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made, within the period of twenty years. There is also another presumption—a presumption of fact, or, more properly, in the nature of evidence, which can be drawn by a jury from the circumstances of the case, *in less than twenty years*. (*Cheever v. Perley*, 11 *Allen*, 587. 1 *Greenl. Ev.* § 39. *Botts v. Ballman*, 1 *Yeates*, 584. *Cottle v. Payne*, 3 *Day*, 289. *Winstanley v. Savage*, 2 *McCord's Ch.* 435. *Goldhawk v. Duane*, 2 *Wash. C. C.* 323. *Blake v. Quash*, 3 *McCord*, 340, 343. *Henderson v. Hamilton*, 1 *Hall*, 314. *Jackson v. Pratt*, 10 *John*. 381. *Bander v. Snyder*, 5 *Barb.*

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63.) But when the obligation can be extinguished only by deed, *the rule is different*. In that case, there is no presumption of law at all; but there is the same presumption, in the nature of evidence, as in the other cases. It is a presumption to be drawn from all the circumstances of the case; but mere length of time, by itself, will never raise it. That one circumstance, of itself, is insufficient; but it is a circumstance from which, in connection with other circumstances, the satisfaction of the obligation may be found by a jury, or decreed by a court of chancery. And the cases upon this question are all consistent. At law, if there has not been a verdict, the issues are sent back, to be tried before a jury. In chancery, the presumption is drawn by the court, from all the circumstances of the case, as it would be by a jury; and not as a presumption of law. (*Woodfall*, 487. *Runn*. 276. 1 *Phil. Ev.* 160, ed. of 1839. *Eldridge v. Knott*, *Cowp.* 214. *Mayor of Hull v. Horner*, *Id.* 102. 2 *Burr.* 1071. *Palmer v. Wettenhall*, 1 *Ch. Cas.* 184. *Collet v. Jaques*, *Id.* 120. *Boleter v. Massey*, *Rep. Temp. Finch*, 241. *Livingston v. Livingston*, 4 *John. Ch.* 287.) This last case is in point. The chancellor says, at page 292: "How can the lapse of time be brought in as presumptive evidence of payment when the defendant, in his answer, admits the original covenant to pay, and does not pretend to any payment?" In *Jackson v. Davis*, (5 *Cowen*, 130, 131,) the court say, (page 131:) "When the relation of landlord and tenant has once been established, under a sealed lease, the mere circumstance that the landlord has not demanded the rent cannot justify the presumption that he has extinguished the right to it by a conveyance," &c. (*Cole v. Patterson*, 25 *Wend.* 456, 458. *Failing v. Schenck*, 3 *Hill*, 345, 346. *Bailey v. Jackson*, 16 *John.* 211. *Tyler v. Heidorn*, 46 *Barb.* 462, 463.)

The question as to whether there are cases in which an absolute presumption of law can be drawn, will be determined, therefore, by considering the relations which

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were created by the indentures; and that cannot be deemed an open question, in this State. It has been settled by numerous adjudications upon the Van Rensselaer leases, in the Court of Appeals; and it has been held that such instruments are deeds of assignment, leaving no estate, reversion or possibility of reverter in the grantor; and not creating a rent service. (*Depeyster v. McMichael*, 6 N. Y. 507. *Van Rensselaer v. Hays*, 19 id. 68, 71, 76, 83. *Van Rensselaer v. Dennison*, 35 id. 393, 399, 400.) But they do create a rent charge, which is properly styled rent. (*Cases supra*. Also *Van Rensselaer v. Ball*, 19 N. Y. 107. *Same v. Snyder*, 13 id. 299, and cases cited by *Selden, J.*) That they create the relation of landlord and tenant, (*Van Rensselaer v. Smith*, 27 Barb. 104; *Same v. Snyder, supra*; *Hunt v. Comstock*, 15 Wend. 665; *Depeyster v. McMichael, supra*; *Tyler v. Heidorn*, 46 Barb. 450;) and that the grantor's interest is an hereditament, descendible and hereditary. (*Van Rensselaer v. Hays, supra*. *Same v. Read*, 26 N. Y. 558. *Tyler v. Heidorn, supra*. *Nicoll v. N. Y. and Erie R. R. Co.*, 12 N. Y. 131, 132.) It follows that any release of the rent must be by deed; and that there can be no presumption of payment, in law, from lapse of time.

I am, therefore, constrained to dissent from Justice Ingalls' statement, in *Lyon v. Chase*, (51 Barb. 14,) to the contrary effect, viz: That "there would seem to be no distinction between the covenants contained in the instrument in question and other sealed instruments, so far as the presumption of payment or extinguishment is concerned." That remark of the learned judge appears to me to have been founded upon a misconception of the case of *Van Rensselaer v. Dennison*, (*supra*,) to which he refers. That case, it is true, holds an instrument like this indenture to be a deed of assignment, and not a lease. So had all the previous cases. But it evidently was not intended, by simply stating this proposition, to overrule

all the previous decisions, as to the *status* of the grantor; and that very clearly appears from the opinion of the court, at page 400, where it is stated that, nevertheless, such an instrument creates a *rent charge*, which is an hereditament, devisable and assignable.

The case of *Lyon v. Chase*, standing alone, as authority to the point that "there would seem to be no distinction between the covenants in this instrument, and other sealed instruments," it will not do to follow; especially in cases where the grantees of the estate have accepted their conveyances "*subject to the rents in the original conveyance*," which amounts to an implied covenant to pay, added to the proof, or admission, that such rent had not been paid. Indeed, it is in conflict with an opinion in the same court, in *Tyler v. Heidorn*, per HOGEBROOM, J., (46 Barb. 463.) The only cases where presumption is allowed, is a presumption to be found from *extrinsic facts*, (not of law,) such as in the case of *Livingston v. Livingston*, (4 John. Ch. 294,) distinguished from the same title, in the case next preceding it, page 287, in the same volume. In that case, the original conveyance contained a reservation of rent, but no rent had been claimed or demanded for forty-four years, which was from the beginning. The lessor never demanded or received rent; his son, who inherited, never received or demanded any; and the grandson, who also inherited, never received or demanded rent. The estate was in possession of infant heirs, and the original lease and counterpart were lost; and no affidavit of its loss produced. The chancellor held that *the facts* authorized the *presumption* of a release or extinguishment. Strong exceptional cases of this kind are to be found, where, from *facts*, a presumption may be found. I think the distinction between presumptions of law, and presumptions that may be drawn from facts to be established on a trial, is clear, and (with great respect) must have been overlooked by the learned judge, in *Lyon v. Chase*.

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The result is that we can draw no conclusion of *law* from the lapse of *time* during which the rent has remained unpaid; but any presumption which we may raise must be drawn from all the facts and circumstances of the case as evidence, in the same manner in which a jury would draw inferences of fact. Lapse of time is, doubtless, a circumstance, and perhaps a strong one, to be used as *evidence*, in raising such a presumption; but is, of itself, not at all conclusive, and unless of great extent, perhaps not, ordinarily, sufficient. It is necessary, therefore, to look into the facts of the cases.

The first entitled case is quite plain. It appears that the premises in question were conveyed to the defendant by one Cole, *subject to the rents then due and to become due, to Stephen Van Rensselaer and his heirs and assigns*. This conveyance was executed on the 19th day of October, 1842. I hold, upon the authority of *Freeman v. Auld*, (44 N. Y. 50,) that by receiving his title subject to these rents, the defendant is estopped from denying that they were then subsisting liens upon the premises, and that the covenants to pay them were then in force. But, if that be not so, here is at least an explicit admission, in writing, by Cole, his grantor, of the subsistence of the covenant; and that, by all the authorities, is sufficient to rebut the presumption of extinguishment, even as against a presumption of law. (*Cheever v. Perley*, 11 Allen, 587. 1 Cowen & Hill's Notes, 317, ed. of 1839.) And the defendant acquired only Cole's title. But it appears, further, that the defendant, by the deed mentioned, acquired only an estate *in remainder* subject to a life estate in one Merchant; and that this life estate was conveyed to him, in 1850, by a deed *subject to the same conditions*. By the ordinary rule, the payment of the rents would be charged upon the tenant for life, and therefore the defendant did not become obligated to pay them, until he received his deed from Merchant, in 1850. And in this case, that deed

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would have had the same effect as has already been ascribed to the deed from Cole. Be this as it may, the lapse of time from which the presumption has been sought to be drawn must date either from Cole's deed, or Merchant's deed. In the latter case, there is but twelve years; in the former, there is less than twenty years; but neither is sufficient, without other special circumstances, such as this case does not disclose.

The judgment in the first of the above cases must therefore be affirmed.

The other case will present more difficulty. The effect which has been given to Cole's and Merchant's deeds cannot be here ascribed to Carr's deed to the defendant Brown, because although that deed is drawn upon the back of, and refers to, the former deed, which expressly conveyed the premises subject to the rents, still it does not perpetuate that condition. On the contrary, it purports to convey *all Carr's interest*, without in the least disclosing what that may be, and refers to the former deed only for a description of the premises. *Non constat*, as far as the deed to the defendant is concerned, but what Carr might have obtained a release of the rents prior to 1839, and then the defendant would, by that deed, have taken the land free of the burthen.

The case then stands thus: The deed to Carr shows that in 1817 the rent was a subsisting obligation, and Carr was personally bound to pay it. From that time until 1839 it does not appear that any rent was paid; neither does it appear that the rent was not paid; nor that any release or discharge was given. From 1839 to the bringing of this action—a period of twenty-five years—it appears affirmatively that no rent has been paid; and that none had been demanded of the defendant; but on the other hand, it is shown that no release or discharge has been given.

As to the first period, I am inclined to think that from

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the ordinary legal presumptions of continuance of a fact once proved, and the special adjudications, the relations of landlord and tenant, once proved, will be presumed to continue; though a presumption of the payment of the rent might probably be drawn. But as I cannot find any adjudged case which specially establishes that doctrine, I will at present lay it out of account. I think, however, that the case of *Tyler v. Heidorn*, (46 Barb. 461,) must control us in disregarding that period; and as I cannot find a case where the presumption has been drawn in which the fact of non-payment was not affirmatively proved, as a question of fact, I am the more inclined to bow to its authority and act upon it. Our consideration will, therefore, be limited to the remaining period of twenty-five years.

It is claimed by the plaintiff that any presumption of a release is rebutted by this: that the fact is proven to have been otherwise. The defendant, on the other hand, insists that the presumption does not in the least depend upon the truth of the matter. The adjudged cases upon this question are not as satisfactory as could be desired. In *Hillary v. Waller*, (12 Ves. 239,) it is said by the master of the rolls, (p. 252,) and by the lord chancellor, (p. 266,) that "presumptions do not always proceed upon a belief that the thing presumed has actually taken place." But "it is because there are no means of creating belief, or disbelief, that such general presumptions are raised upon subjects of which there is no record or written muniment." But this is by no means saying that you can presume directly in the face of your belief. Again, Lord Mansfield's remark in *Eldridge v. Knott*, (*supra*,) that "a grant is presumed, for the purpose of quieting the possession," has been extensively quoted, and is referred to here as authority, by the defendant. But *Eldridge v. Knott* proves too much for the defendant's case. Though Lord Mansfield did make the remark ascribed to him, as to the quieting of possession, in certain cases, he also added as follows:

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"But in this case *there is mere length of time* (37 years) which, *barely as such*, ought not to be received as a bar; and if so, the case stands without a pretense for supposing a *release* or extinguishment." And Ashton, J., in the same case, said: "A presumption from mere length of time which is to *support* a right, is very different from a presumption to defeat a right." There the presumption was claimed to defeat the landlord's right to the rent; and Baron Eyre had, on the trial, left it to the jury as a *fact*, whether, from an acquiescence for thirty-seven years, they would not presume a release or extinguishment. The jury found it was released or extinguished; and the court reversed the judgment. These views of the judges were cited with approbation, in our Supreme Court, in *Jackson v. Davis*, (5 Cowen, 132.)

But the case before us is not a case where the possession would be quieted, because, (as was observed by the late Supreme Court, in *Jackson v. Davis*, 5 Cowen, 132,) "the defendant's possession as tenant is not inconsistent with the plaintiff's title." It cannot be denied, however, that many cases have been decided upon the *presumed intention* of the party who is to be supposed to have given the release; and this ground of presumption is very clearly stated by Chancellor Kent in the case of *Giles v. Baremore*, (5 John. Ch. 550.) Although that was a case where, as appears from its *facts*, the presumption applied was one in the nature of evidence drawn by the court from the intention of the party. The case of *Jackson v. Welden*, (3 John. 283, 290,) proceeds upon the ground of estoppel, by long acquiescence with knowledge of the adverse claim. These cases, if they give any support to the defendant's position, must stand upon the ground of the right to presume a release simply because of the party's having entertained the intention of giving one to be inferred from his knowledge of his rights, and sitting still without asserting them, and permitting others to acquire interests and

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consider themselves the owners of property. If this be a good ground, then just as soon as the *intention* is established, the fact as to whether the release was actually given, becomes entirely immaterial. But, on the other hand, this is entirely opposed to the very rule under which we must draw the presumption, if we draw it all. If we are right in our views of the law, it must not be forgotten that in this case we cannot draw a presumption of law, but only a presumption in the nature of evidence. Evidence of what? The adjudged cases answer; evidence that the release has been given; evidence that it has not, if of equal strength, will clearly destroy it. And when the evidence to the negative is conclusive, it must be stronger than any which can be presumed to the contrary. Again; all the cases hold that a clear acknowledgment by the party claiming the presumption will rebut it, even when it is one of law. But if the sole ground be the intention of the one against whom the presumption is raised, how can the admission of any one else effect that? I think that we must strike a middle course, and neither throw the fact that no release has been given, out of the account, nor allow it to be conclusive in rebutting the presumption. That fact may well be important, in discovering the releasor's intention. And I apprehend that we ought to require a greater lapse of time, and more unequivocal acts, to establish the presumption, than if we were in doubt as to whether a release had been given in fact.

On the former appeal, in these actions, in the general term, the presumption of release was drawn after twenty-two years of non-payment, when it appeared not only that no rent had been demanded, but that none had been claimed. That appears to be the only instance to be gathered from the reported authorities, when such a presumption has been drawn in less than thirty years; and that with other circumstances to aid it. And if we examine this case upon the theory of a presumption of fact,

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even with the proof that no rent has been claimed, but with proof to a degree of certainty that no release has ever been given, there is sufficient in the case to warrant the finding of the referee, and to justify us in holding that no presumption arises, of a release, from twenty-five years' lapse of time; and that this case is easily distinguished from the cases where a presumption has been held to arise from the peculiar and special circumstances upon which the presumption may be sustained.

It remains to examine the minor questions raised by the defendant, in his argument.

First, he claims that there is no proof that these are the same premises conveyed by the indenture reserving rent. It appears that this indenture was executed in 1794, to Abner Bull. That in 1813, and previously, the premises owned by the defendant were part of a farm known in the neighborhood as the "Abner Bull farm." They were so called by the witness Carr, who, in 1817, conveyed to the defendant's grantor. The question on this point is, whether this is a sufficient identification. The deed from Carr will not help us any, because its description does not at all correspond with that in the original indenture, except that it appears that the lands conveyed are situated in the same township.

It is an established rule that persons of the same name will be presumed to be the same person, at least until it appears that there are two persons bearing that name. (2 Cowen & Hill's Notes, ed. of 1839, p. 130.)

With considerable hesitation, I have come to the conclusion, in the absence of special authority either way, that the same rule should be applied to parcels of land owned by the same person. The Abner Bull who owned this farm at so early a day, and so near the date of the grant, will therefore be presumed to be the grantee in the indenture. And in the absence of proof that he owned two farms, the one called by his name will be presumed

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to be the same one conveyed to him by the indenture. This is, perhaps, slender evidence upon which to sustain the identity. But in ascertaining facts relating to the ancient possession and claim of lands, courts will both receive and give effect to evidence which would, for other purposes, be inadmissible and inconclusive if offered to prove events occurring within the period of the memory of living witnesses.

The defendant further claims that the indenture should not have been admitted in evidence, because there was no proof of possession under it. Under the decisions, that does not appear to be necessary. It is said that if a deed appears to have been in existence for thirty years, and during that time to have been in the proper custody, it is sufficient if something is shown, in addition, tending to establish the authenticity of the instrument. "If possession has accompanied the deed for that length of time, that is enough. If not, other circumstances may be resorted to, for the purpose of raising the necessary presumption in favor of the deed." (*Clark v. Owens*, 18 N. Y. 437.) It is also said that "a deed appearing to be of the age of thirty years may be given in evidence without proof of execution, if such an account be given of it as may, under the circumstances, be reasonably expected, and will afford the presumption that it is genuine." (*Enders v. Sternbergh*, 1 *Keyes*, 268. *Jackson v. Laroway*, 3 *John. Cas.* 288. *Hewlett v. Cock*, 7 *Wend.* 371. *Bogardus v. Trinity Church*, 4 *Sandf. Ch.* 633.) This indenture appears, by its date, to have been seventy-seven years old, at the date of the trial.

Its existence is traced back for over twenty-five years, and during that time it appears to have been in the possession of the grantor's devisee and his assigns, who were its proper owners. In addition to this, it appears by the presumption already drawn from Carr's evidence that the grantee under the indenture owned the premises conveyed

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by it. I am of the opinion that that is sufficient to render it admissible within the rules of the cases already cited.

The defendant's claim that Van Rensselaer is not proved to have been seised, at the date of the indenture, is not tenable. The indenture, if admissible, proves the seisin. (1 *Greenl. Ev.* §§ 141, 144.)

For these reasons, I am of the opinion that both judgments should be affirmed, with costs.

Judgments affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, March 5, 1872. *Miller, P. Potter and Parker*, Justices.]

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* Roswell Beardsley and others, *vs.* MILES VAN VALKENBURGH, County Judge of Tompkins county.

A county judge has no authority to proceed, under the act of May, 18, 1869, (*Laws of 1869, ch. 907*), to bond a town in aid of the construction of a railroad, except in proceedings to aid a *valid corporation*. The legal existence of the corporation, as such, is a jurisdictional fact.

The act of 1860, authorizing the formation of railroad corporations, (*Laws of 1860, ch. 140*), under which articles of association purported to have been filed and a corporation organized, requires that articles of association shall state "the name of each county in this State, through, or into which," the railroad "is made, or intended to be made." In the articles of association produced before a county judge, in proceedings under the act of 1869, this particular was omitted. *Held* that the court could not take judicial notice of distances, and hold, in the absence of the positive statement required by the statute, that this omission was not material.

Held, also, that the case did not show that a valid charter was produced before the county judge; and that this point was material to the question of his jurisdiction.

In proceedings under the act of 1869, to bond a town in aid of the construction of a railroad, the *petition* must direct whether it is in *stock*, or in *bonds*, that the money to be raised shall be invested.

Where the petition "desired" that a town should create and issue its bonds

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to the amount of \$75,000, "and to invest the same, or the proceeds thereof, in the stock, or bonds, or both," of a specified railroad company; *Held* that the petition was defective and irregular; was not a compliance with the statute; and did not confer jurisdiction on the county judge.

In such proceedings the burden of showing that a majority of the tax-payers have signed the petitions is upon the petitioners. There is no presumption to be indulged, that public officers have done their duty; but every step in the proceeding must be proved to be within the powers conferred by the statute.

The county judge acquires his jurisdiction to make his orders, in these cases, from the statute; and can act only by virtue of the authority so conferred.

THIS case comes up upon *certiorari* to the county judge of Tompkins county, to review an order made by him on the 20th March, 1871, adjudging that a petition to bond the town of Lansing, in said county, was in due form, and was duly signed and executed; that the petitioners constituted and represented a majority of the tax-payers of said town, as shown by the last preceding tax list, or assessment roll of said town; and that the said petitioners represent a majority of the taxable property upon said last preceding tax list or assessment roll. The petition or petitions were in the following form:

"The petition of the undersigned, residents and others, and whose names appear upon the tax list and assessment roll of the town of Lansing, in said county, as owning or representing certain taxable property in the corporate limits of said town, respectfully shows, that the said petitioners desire that the said town of Lansing shall create and issue its bonds to the amount of \$75,000, and to invest the same, or the proceeds thereof, in the stock or bonds, or both, of the Cayuga Lake Railroad Co., in pursuance of an act of the legislature of the State of New York, entitled 'An act to amend an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations,' &c., passed May 18th, 1869, (*Laws of 1869, ch. 907*;) and in furtherance of

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the objects of said act we have hereunto signed our names, at the said town of Lansing," &c.

The material facts are sufficiently stated in the opinion.

A. J. Parker, for the relator.

J. R. Cox, for the respondents.

By the Court, P. POTTER, J. The county judge acquires his jurisdiction to make his orders, in these cases, from the statute, and can only act by virtue of the authority so conferred. The first step he is authorized to take, is by virtue of a provision of chapter 907, of the laws of New York, passed in 1869, which is as follows:

Section 1. "Whenever a majority of the tax-payers of a municipal corporation in this State, whose names appear upon the last preceding tax list or assessment roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of said corporation, shall make application to the county judge of the county in which such corporation is situated, by petition verified by one of the petitioners, setting forth that they are such a majority of tax-payers, and represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, (but not to exceed twenty per cent of the whole amount of taxable property as shown by said tax list and assessment roll,) and invest the same, or the proceeds thereof, *in the stock or bonds (as said petition may direct)* of such railroad company in this State as may be named in said petition, it shall be the duty of said county judge to order," &c.

Section 2. "It shall be the duty of the said judge, at the time and place named in the said notice," (the notice he is required to give,) "to proceed to take proof as to the said allegations in said petition" &c., "and if it shall ap-

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pear satisfactorily to him" &c., he shall so adjudge and determine, and cause the same to be entered of record," &c.

If it shall be adjudged, that the allegations in the petition are sufficiently established, it is then made the duty of the county judge, by section 3 of said act, to appoint and commission three persons, who shall be freeholders, residents and tax-payers within the limits of such town, or municipality, to be commissioners for the purposes afterwards named in said act.

Section 4 of the said act prescribes some of the powers and duties of the said commissioners; and sec. 5 provides among other things, as follows: "Such commissioners are further empowered and directed to subscribe, in the name of the municipal corporation which they represent, to the *stock or bonds* of the railroad company named in such petition, (*as the petition may direct,*) to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor, at par; or they may, at their discretion, sell and dispose of the said municipal corporation bonds, so created by them, at rates not less than par, and invest the proceeds thereof in such stock or bonds of such railroad company *as may be directed in said petition.*"

The portions of the sections above quoted contain all the powers conferred, and the limitations and restrictions directed, that the case calls upon us to review.

It was held in this Department, in *The People v. Adirondack Co.* (57 Barb. 661,) that there must be a legal corporation, capable of receiving aid in the manner offered, in order to give authority to adjudge the bonding of a town to be valid.

The contestants, before the county judge, presented a certified copy of the articles of association of the Cayuga Lake Railroad, to show that it was not organized in pursuance of the provisions of the general railroad act. (*Laws of 1850, ch. 140.*) The onus of proving a legal

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corporation was perhaps on the petitioners. Be this as it may, the county judge had no authority to proceed, but in proceedings to aid a *legal railroad company*. I think their legal existence, as a corporation, was a jurisdictional fact. The act which authorizes the formation of railroad corporations, and under which their articles profess to have been filed, and their corporation organized, requires, among other things, that they shall state "*the name of each county in this State, through, or into which, it is made, or intended to be made.*" This particular was omitted in the articles produced, and while it is probable that the petitioners of Lansing, Cayuga county, supposed this railroad was to be built in Cayuga county, it is just as good a charter for a railroad in Seneca county, through which last mentioned county they might not have been willing to have bonded their town to render aid. A starting point, from the New York Central railroad, and terminating at Ithaca, would answer for either county; and we cannot take judicial notice of distances, and hold, in the absence of the positive statement required by the statute, that this omission is not material. I think the case does not show that a valid charter was produced before the county judge, and that this point was material to the question of his jurisdiction, and that such aid can only be granted to a valid corporation.

But suppose we are wrong in this view. The contestants also raise the point against this exercise of power by the county judge, in that "*the petition did not direct*" whether it was in stock, or in bonds, that the money to be raised, should be invested. The statute seems to contemplate that this *direction* should be given by the petitioners. Such is its language in the first section, and repeated in the fifth, ("as the petition shall direct.") No power is conferred upon any other person or body *to direct*. This is an important power, and is to be exercised by somebody, or the aid to be raised is useless, and the application

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of the fund would be impracticable. The statute by pointing out *by whom* this direction is to be made, by proper construction, excludes every other power or party. No such direction was given by the petitioners, or in the petition. It is left, in fact, without direction. Who then can direct? In the order made by the county judge, he appoints three persons, naming them, as commissioners, whose duty it shall be to execute the bonds *for the purposes set forth in the petition*. What is that purpose? To invest in bonds, or in the stock of the railroad? Which? The petition does not direct. Who can? This is an important power. To invest in the bonds of the railroad, might or might not be a good investment. To invest in the stock might be worthless. Who is to direct, then? Did the statute intend to vest this power in the commissioners? Have they a discretion to invest as they shall think best? I think not. I think the petition is defective and irregular; is not a compliance with the statute; and did not confer jurisdiction on the county judge.

But I think, also, that it is not clearly shown that a majority of the tax-payers have signed the petitions. The burthen of showing this was upon the petitioners. If we adopt the rule laid down in the dissenting opinion of *The People v. Hulbert*, (59 Barb. 486, *§c.*.) which has been adopted in the Court of Appeals, upon a review of that case, then we hold, that there is no presumption to be indulged that public officers have done their duty; but every step in the proceeding must be proved to be within the powers conferred by the act. Taking the names of persons who signed the petition without proof of their authority, such as executors, &c., such as signed by proxy, those whose names were not on the petition, or whose petition was not before the judge till the day of hearing, &c., and it does not appear, affirmatively and clearly, that a majority of the tax-payers are shown by legal proof; by legal evidence according to the rule in the cases of

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The People v. Hulbert, (*supra*;) *The People v. Smith*, (3 *Lansing*, 291; *S. C. in Court of Appeals*, 4 *Albany Law Journal*, 64;) *The People v. White*, (*Id.* 159,) to have signed the petitions.

I think the proceeding must be reversed.

Proceedings reversed.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, March 5, 1872. *Miller*,
P. Potter and *Baloon*, Justices.]

THE CHENANGO BRIDGE COMPANY vs. FREDERICK LEWIS
and others, executors &c. of Hazard Lewis, deceased.

The plaintiffs were incorporated in 1808, by a perpetual charter allowing them to erect a toll-bridge across the Chenango river, for the accommodation of the public; and it was declared to be unlawful for any person to erect a bridge, or establish a ferry, within two miles of the plaintiffs' bridge. Under this charter, the plaintiffs erected their bridge, and had ever since maintained it. By an act of the legislature, passed in 1855, the Binghamton Bridge Company was incorporated, for the purpose of constructing a toll-bridge across the same river, *within two miles of the plaintiffs' bridge*, and a bridge was built by them, about 80 rods above the plaintiffs' bridge, under the direction of L., (the defendants' testator,) as contractor, who was a stockholder of the Binghamton Bridge Company, and owned the land at one end of said bridge. It was completed prior to August 5, 1856, and was opened as a toll-bridge, and used as such until it was carried away. L. repaired the bridge, prior to its destruction, under contracts with the company, of which he was a director at the time of his death, in 1863. On the 17th of March, 1865, the Binghamton bridge was swept away by a freshet, and was carried against the plaintiffs' bridge and destroyed it. In an action brought by the plaintiffs against the B. Bridge Company, to restrain the building of the bridge, and for damages, the Supreme Court of the United States decided that such bridge was both contrary to law, and an infringement of the plaintiffs' legal rights.

Held, 1. That the bridge was a private nuisance.

2. That the defendants, as personal representatives of L., who had erected and continued such nuisance, were liable to the plaintiffs for the damages caused by the Binghamton bridge: including the diversion of tolls, and the value of the bridge destroyed.

63	111
126a	119
63b	111
30ap	69

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The liability for a nuisance is not restricted to persons who occasion the whole of it; but those who are guilty of doing but a part are liable, also, if they do it with like intent.

Thus, where the nuisance is not the structure, but the illegal use of it, the liability attaches not only to those who are engaged in the use, but also to those who erected the structure with the knowledge, or the intent, that it should be put to the illegal use. And the liability of the builder is precisely the same as if he had been the employer, instead of the employee.

It is the general rule that the creator of a nuisance is liable for its continuance.

To this rule there is an exception, where he is not in possession of the premises, which are occupied by other persons claiming them as their own, and not holding as his tenants.

The books of a corporation, proved to have been kept by its treasurer, in the business of the company, and to be in his handwriting, accompanied by proof of his death, are admissible in evidence, under the rule that entries made in the usual course of business, by one who had no interest to falsify, should be received in evidence, after his death.

The books of a bridge company proved by its treasurer to have been kept by him, and to contain correct entries of tolls, as given to him by the toll-gatherer, coupled with proof by the toll-gatherer that he had made correct reports of the toll received by him, are admissible as evidence, because proved by the treasurer who kept them.

But books of the company, proved by its treasurer to have been received by him as the company's books, upon his accession to office, and containing an account of the tolls received for a period of several years previous to that time, are not admissible as evidence to prove the amount of tolls received during that period, without the necessary and proper preliminary proof as to such tolls.

It is not sufficient to show that such books are *said to be*, or that they *purport* to be, the books of the corporation. To make their contents evidence, it is not enough, to prove that they appear to be the books of the corporation; nor is it enough, to prove that they were in the handwriting of the former treasurer, or toll-gatherer.

MOTION for a new trial, upon exceptions, ordered to be heard at general term, after verdict for the plaintiff. The case was this. The plaintiffs were incorporated in 1808. (*Laws of 1805, ch. 89; Laws of 1808, ch. 119.*) By their charter they were to erect a toll-bridge across the Chenango river, for the accommodation of the public. And it was declared to be unlawful for any person to erect a bridge or establish a ferry within two miles of the plaintiffs' bridge. The charter was perpetual. Under

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this charter the plaintiffs erected their bridge, and have ever since maintained it, except on occasions when new bridges were being erected in place of the old ones.

By chapter 164, of the laws of 1855, the Binghamton Bridge Company was incorporated, for the purpose of the construction of a toll-bridge across the Chenango river, within two miles of the plaintiffs' bridge. Its capital stock was 400 shares. Of these, the defendants' testator subscribed for, and became the owner of, 60 shares. At that time he was the owner of certain premises upon the bank of the river, about 80 rods above the plaintiffs' bridge; and Daniel S. Dickinson owned a corresponding portion of the opposite bank. These premises were conveyed by them to the Binghamton Bridge Company. And upon them a toll-bridge was erected across the river by the defendants' testator, under contract with the Binghamton Bridge Company. That bridge was completed prior to August 5, 1856, and was opened as a toll-bridge, and used as such, until it was carried away by a freshet, March 17, 1865. Between those dates, the defendants' testator repaired the Binghamton bridge, under contract with the company; and he was a director of the company until his death, in 1863. March 17, 1865, the Binghamton bridge was carried away by a freshet, and was carried against the plaintiffs' bridge, and destroyed it. May 17, 1856, the plaintiffs brought their action against the Binghamton Bridge Company to restrain the building of its bridge, and for damages. That case finally went to the Supreme Court of the United States, (*see* 3 *Wall.* 70,) and such proceedings were therein had, that, December 1, 1866, judgment of this court was entered in favor of the plaintiffs, and against the Binghamton Bridge Company, for \$4595.61. Upon which execution was issued and returned wholly unsatisfied.

The plaintiffs then brought this action to recover damages for the diversion of tolls, and for the loss of their

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bridge. The jury have rendered a verdict for the plaintiffs for \$7718.88, and the defendants now move for a new trial, upon exceptions.

L. Seymour, for the defendants.

Henry R. Mygatt, for the plaintiffs.

P. POTTER, J. The plaintiffs seek to maintain this action upon this theory: That the Binghamton bridge was a *nuisance*; that the defendants' testator erected and continued that nuisance; that by a familiar rule, all who are engaged in the commission of a nuisance, trespass, or other illegal act, are principals; and liable to respond in satisfaction for the *whole*. The defendants, in reply, contend that the bridge was not a nuisance. In this, I think, the defendants are mistaken. The United States court has decided that it was both contrary to law, and an infringement upon the plaintiffs' legal rights. It was also to the plaintiffs' hurt. Therefore it was clearly what is known in law as a private nuisance. The defendants further contend, that the bridge, itself, was not a nuisance, but only became so, by its use; that Mr. Dickinson and the defendants' testator, or their grantees, had a right to bridge the stream for their private convenience; that the erection of the bridge was therefore innocent and lawful; and, that the defendants' testator cannot be held responsible for the erection of a nuisance; because the nuisance was not created by the erection of the bridge, but by its subsequent unlawful use. The defendants are doubtless correct in their simple position, that riparian owners have a right to bridge a stream for their private use; but, the *conclusion*, I am inclined to think, does not follow; because the liability for a nuisance is not *restricted* to persons who occasion the whole of it, but those who are guilty of doing but a *part*, are liable also, if they do it with the like

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intent. That is to say, in this very case, when the nuisance is not the structure, but the illegal *use* of it, the liability attaches not only to those who are engaged in the use, but also to those who erected the structure with the knowledge, or the intent, that it should be put to the illegal use. (*Fish v. Dodge*, 4 *Denio*, 311. *Pickard v. Collins*, 23 *Barb.* 444. *Gilhooley v. Washington*, 4 *N. Y.* 217.) It can hardly be contended, upon the facts in this case, that the defendants' testator did not know of the *use* for which the bridge was intended. And his liability is precisely the same as if he had been the employer, instead of the employee. (1 *Chitty's Plead.* 83, 84. *Thompson v. Gibson*, 7 *Mees. & W.* 456.) As to his liability for the *continuance* of the nuisance, it is in proof in the case, that he was engaged in keeping the bridge in repair. Besides, it is the general rule, to which there is but one exception, stated in *Blunt v. Aikin*, (15 *Wend.* 522,) that the creator of a nuisance is liable for its continuance; and it has been specially held that one who erects a nuisance upon the land of a stranger is liable for its continuance, though he cannot enter there to remove it. (*Thompson v. Gibson*, 7 *Mees. & W.* 456. *Fish v. Dodge*, 4 *Denio*, 317.)

I am therefore of the opinion that the defendants are liable, in this action, for the damages caused to the plaintiffs by the Binghamton bridge.

The defendants objected, on the trial, to the admissibility of the plaintiffs' books, and those of the Binghamton Bridge Company; and they now contend that their reception was error. This evidence was of three kinds. 1. The books of the Binghamton Bridge Company, proved to have been kept by its treasurer in the business of the company; and to be in his handwriting, and that the treasurer was dead. 2. The books of the plaintiffs, proved by its treasurer to have been kept by him, and to contain correct entries of tolls, as given to him by the toll-gatherer, and coupled with proof, by the toll-gatherer, that he had

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tiffs, and not the latter. It was only in respect to its *use* as a public bridge that the plaintiffs had any right to complain. Only in that single view, and to that extent, alone, was it a *nuisance*; and in abating the nuisance, the plaintiffs would have had no right to go further than was necessary to prevent such *use*, (36 *N. Y.* 300; 3 *Hill*, 621 to 624,) as the court would go no further in enjoining the Binghamton Bridge Company, (46 *Barb.* 666,) and as the plaintiffs, in their first suit against the Binghamton Bridge Company, sought no further relief. (30 *How. Pr.* 348.) In *Barclay v. Commonwealth*, (25 *Penn.* 503,) Woodward, J., says: "When an erection or structure constitutes the nuisance, as when it is put in a public street, its destruction, or removal, is necessary to the abatement of the nuisance; but when the offense consists in a wrongful use of a building, harmless in itself, the remedy is, to stop such use, not to tear down or remove the building itself." This clearly indicates the distinction between the erection, and the use, of the bridge, which it is necessary to keep in mind in this case. If it were the structure itself, which constituted the nuisance, the erection of it would be wrongful; but not so when the nuisance consists only in the use of the structure, in itself harmless. The erection of such a structure is not wrongful; whatever may be the motive with which it is erected. (23 *Barb.* 459. 5 *Seld.* 450. 13 *Wend.* 261.) In respect to the bridge in question, however long it might have stood, before being opened to the public use, the plaintiff would not have been harmed by it. It is not possible, then, to make the act of erecting it wrongful. The wrong begins only from the forbidden use of it.

The building of the bridge, then, not being unlawful, nor wrongful against the plaintiffs, there is no ground for holding H. Lewis, or his estate, liable for the going off of the bridge, and its floating against the plaintiffs' bridge and carrying it off; unless it went off by reason of negli-

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gence or unskillfulness in its construction. And the court was in error in holding the contrary; and in excluding all consideration of that question from the case.

As to the liability for the opening of the bridge to public use, although there may be much room to doubt whether H. Lewis could be made liable, individually, for what he did as a corporator, (*see 1 East, 555,*) yet it may be that enough appears in the case to implicate him, individually, in that act, and so to make him liable to the plaintiffs for the loss of tolls occasioned by the wrong.

In respect to the admissibility of the books of the plaintiffs' treasurer in evidence, I agree with my brother POTTER, that they were not admissible, any further than their contents were verified by the treasurer. They were admitted to show the yearly tolls of the plaintiffs' bridge, for eight years next prior to 1855, and the eight years next succeeding, although the treasurer who introduced them became treasurer in 1860, and then first became acquainted with them. I do not see on what principle the plaintiffs were entitled to use their own books for the thirteen years before 1860, entirely unauthenticated as they were, against the defendants, who were utter strangers, and in no way connected with them; to make out, by the comparison of yearly amounts of toll, received by the plaintiffs before and after the Binghamton Bridge Company's bridge was opened for travel, the loss occasioned by such opening. If such comparison was a competent mode of showing the loss for which the defendants were accountable, (which may be doubted,) still the evidence of the yearly receipts (prior to 1860) was, I think, most clearly defective, in the absence of proof of the correctness of the entries in the books, relied upon. These entries, as they stood upon the books, when offered and admitted in evidence, were merely the plaintiffs' declarations; and these declarations were taken, against the defendants' objection, as evidence. It seems to me palpably wrong.

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For the two reasons above assigned, I am of the opinion that a new trial should be granted, with costs to abide the event.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, May 7, 1872. *Miller, P. Potter and Parker*, Justices.]

REEVES vs. KIMBALL.

K. contracted, in writing, to sell a lot of land to F. The latter being unable to pay for it, applied to the defendant to advance the purchase money and take a deed of the land from K.; and give F. a contract for a deed to be executed on payment of the purchase money advanced, with interest. The defendant advanced \$600, and took a deed of the land. On the 2d of March, 1857, he gave a contract to F., agreeing to convey the land to him on payment of \$600 and interest. F. was in possession of the land. On the 12th of March, 1857, F. applying to the defendant for further advances, it was agreed between them that the defendant should retain the title of the land until he should be paid such other sums as he might let F. have, or become holden for. Such further advances were made, by the defendant, March 1st, 1859. On the 21st of April, 1859, F. sold and assigned the contract of March 2, 1857, to the plaintiff, a part of the consideration being the amount due upon certain notes of F. on which the plaintiff was indorser, and of which he assumed the payment. The plaintiff went into possession of the premises, and continued therein, making payments, from time to time, of interest accruing upon the contract. There was no evidence that the plaintiff purchased the contract with any fraudulent design; and he had no notice of any lien of the defendant, beyond the purchase money.

- Held*, 1. That the plaintiff was a *bona fide* purchaser; and that his agreement to assume the payment of the notes of F. was parting with value, so as to make him a *bona fide* holder for value paid.
2. That the defendant had a better right to retain the title of the premises until his advances, made in pursuance of the agreement of March 12, 1857, were paid, than the plaintiff to a deed of the premises on paying the unpaid purchase money, only.
3. That the defendant's equity was superior to that of the plaintiff, because it was the oldest in time, and was so far superior as to override the rights and equities of the plaintiff as a *bona fide* purchaser for value.

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4. That the principle laid down in *Bush v. Lathrop*, (22 N. Y. 585,) was decisive of this case.
5. That there was no *estoppel* in the case, as against the defendant.

THIS was an appeal by the plaintiff from a judgment entered on the report of a referee. The action was brought by the plaintiff to compel the specific performance of a contract for the sale of a lot of land, in Brownville, Jefferson county. The premises had been owned in fee by one Joseph Knowlton, and were by him contracted to be sold to one Chester Folsom. Folsom being unable to pay for them, applied to the defendant to advance the purchase money and take a deed of the land from Knowlton; give said Folsom a contract whereby the said defendant should agree to give him (Folsom) a deed, on payment of the money advanced, and interest. The defendant, in pursuance of such arrangement, advanced the sum of \$600, and took a deed of the land. On the 2d of March, 1857, the defendant, in further compliance with the said arrangement, gave a contract to said Folsom, agreeing to convey said land to him on payment of the sum of \$600 and interest, at the times and in the manner mentioned in the said contract. Folsom was in possession at the date of the contract, and continued therein until he transferred the possession to the plaintiff, as hereinafter stated. A few days after the date of said contract, and about the 12th of March, 1857, Folsom applied to the defendant for further advances, and it was then agreed between them that the defendant should retain the title of said premises until he should be paid such other sums as he might subsequently let him (Folsom) have, for his note, or become holden for by indorsement or otherwise, for him. The defendant, in conformity with the arrangement, and on or about the 1st of March, 1859, advanced to Folsom \$50, and took from him two notes, with one Knowlton as surety, for 201.78. This was made up of the \$80 advanced as aforesaid, a note for \$25, \$84 for two years' interest on the

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contract price of the land, and a book account against said Folsom and one Garduer. When this arrangement was made, Folsom applied to the defendant for an extension of the time of payment for one year, informing the defendant that the plaintiff was going to assist him pecuniarily, and he wanted the extension for that purpose.

On the 21st of April, 1859, Folsom sold and transferred the contract of the 2d of March, 1857, to the plaintiff, and the plaintiff, in payment thereof, assumed to pay certain notes on which he was then indorser. The plaintiff went into possession of the premises, and has remained in possession ever since, making payments on the contract, from time to time, of interest accruing thereon. The plaintiff had no notice at the time of the purchase of the contract, of the arrangement between Folsom and the defendant, that he (the defendant) should hold the title as security for further advances. But the referee finds, as a question of fact, that the plaintiff knew at that time that the defendant did make further advances to Folsom. The plaintiff was not aware of the arrangement between the defendant and Folsom, as to future advances, until after he called on the defendant for a deed. The referee ordered judgment for the defendant; holding, as matter of law, that the plaintiff was not a *bona fide* purchaser of the contract, not having taken it in payment of a precedent debt; that the defendant's equity was older, and therefore better, than that of the plaintiff; and that the defendant was therefore entitled to hold the title until he was paid the sum of \$134, parcel of the \$201.25 above mentioned. The referee rejected the balance of the said sum, because it was not advanced within the true intent and meaning of the contract.

F. W. Hubbard, for the appellant.

I. The referee found, as a matter of fact, that the plaintiff acted in good faith; that he had no knowledge of the agreement of the 12th March, 1857, between the defend-

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ant and Folsom, until after the tender made by him in March, 1861; that he purchased the contract, and took possession of the land, on the supposition that he would receive a conveyance upon the fulfillment of the contract according to its terms.

II. The referee erred in not finding that the defendant, at the time of the extension of the contract in March, 1859, was informed of the intention of Folsom to assign the contract to the plaintiff. The fact is testified to by Folsom, and not denied by the defendant. Had the referee found the fact according to the evidence, the defendant would have been *estopped* from alleging any claim under the agreement of the 12th of March as against the plaintiff.

III. The referee erred in deciding "that the plaintiff was not a *bona fide* purchaser of the contract, on the ground that he parted with no value for the transfer—that it was taken in payment of a precedent debt." The referee has misapprehended the testimony. There was no precedent debt due from Folsom to the plaintiff. The purchase was absolute, and the consideration paid in the three notes of the plaintiff, of \$262 each.

IV. The referee erred in deciding, "that the plaintiff purchased and took the assignment of the contract subject to all the equities existing at the time between Folsom and the defendant." Also, "that the assignment of the contract was the assignment of a mere *chose in action*, with all its incidents and equities. It is insisted that the learned referee has misconceived the nature of the right or estate, which Folsom, by the assignment, transferred to the plaintiff. A contract for the purchase of land is something more than a mere *chose in action*. By the settled doctrine of *equitable conversion*, the purchaser is vested with an *estate in the land*; in equity he is regarded as the *owner*, and the vendor as his trustee of the legal title. (*Will. Eq. Jur.* 610. 21 *N. Y.* 585.) Equity regards the estate as realty, and as such it will descend to the heirs of the ven-

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dee. (*Champion v. Brown*, 6 John. Ch. 402. Will. Eq. 298.) The statute of descents proceeds on the same principle. This estate of a vendee is not a *chose in action*, in any sense. The interest of the vendor in the contract may be so regarded. A *chose in action* is defined to be a personal right, not reduced to possession, but recoverable by a suit at law. (1 *Burrill's Law Dic.* 213.) It is insisted, therefore, that the referee erred in applying the doctrine in regard to the assignment of choses in action to this case. The plaintiff taking the transfer of the contract in good faith, and for a valuable consideration, took it discharged of any *latent equity* of the defendant.

V. The referee held, "that the defendant, at the time of the transfer of the contract to the plaintiff, had an equitable interest or mortgage of the premises by virtue of the agreement of March 12th, 1857, for the amount of the money advanced and liability incurred after that date. Upon this theory the defense is not maintainable, because the equity of the plaintiff is superior. The contract was assignable, by its terms, and it was the duty of the defendant, if he wished to protect himself against an assignee, to have engrafted his equity or agreement on the face of the contract. He must see to it that an assignee has actual notice of his equities. As Folsom was in possession of the land, there is no ground for alleging constructive notice. The plaintiff was not bound to inquire of the defendant whether he had any claim on the land, aside from the contract. An equitable mortgage will be defeated by a creditor advancing money in good faith. (22 *Law Lib.* 133. 2 *Story's Eq.* § 1020, and note. Will. Eq. 441.)

VI. The defendant is *estopped* by the terms of the contract from setting up his equitable mortgage or claim. He agrees to give a warranty deed to Folsom or his assigns upon the payment of the consideration money expressed, without any other condition. The plaintiff has a right to rely on this as a representation that the defendant has no other

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claim against the land. The defendant put his vendee into the possession of the land, and we found him in possession under this contract, when we purchased. It would be great injustice to permit the defendant now to escape the consequences of his acts, upon the faith of which we have acted. The referee avoids this estoppel by holding that the plaintiff was not a purchaser *bona fide*, because he did not pay value.

VII. The defendant should be *estopped* by his omission to inform the plaintiff of his claim upon the land. The parties had several interviews concerning the matter, and no intimation came from the defendant that he had any claim outside the contract. (3 *Hill*, 219.) The plaintiff paid the interest to the defendant on the theory that the contract was all he had to pay. Had the defendant informed him of his claim, it is to be presumed that he would have protected himself as against Folsom.

VIII. It is insisted that the defendant, when he took the two notes of Folsom in March, 1859, did not rely on the agreement of March, 1857, as his security for their payment, because he required and Folsom gave him the name of Knowlton as security.

IX. If the defendant is right in the theory of his defense the referee erred in ordering the plaintiff to pay the \$84, which was the amount of two years' interest indorsed on the contract, March, 1859. That indorsement imported a cash payment. The plaintiff had no knowledge that it was put into one of the two notes when he purchased the contract. He relied, as he had a right to, on the truth of that indorsement. The defendant should be precluded from now alleging that the money was not in fact paid. It would be absurd to hold that the plaintiff was bound to inquire of the defendant whether his indorsement was truthful. Again, the \$84 was erroneously allowed the defendant by the referee, because it was not within the scope of the agreement of the 12th March, 1857; it was not an

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advance of money from the defendant to Folsom. The judgment should at least be modified in this respect.

X. The whole equity of the case is plainly with the defendant. He bought the contract in good faith, paid all the land was worth, and is without remedy if the defense prevails, and must lose several hundred dollars. On the other hand, the defendant has his debt against Folsom secured by the name of Knowlton as surety. If the plaintiff is compelled to pay the \$134 adjudged against him, he cannot be subrogated to the right of the defendant against Knowlton. Payment by the plaintiff would substantially be payment by Folsom, the principal debtor.

B. Bagley, for the respondent.

I. An assignee of a contract takes it subject to all existing equities in favor of the other party against the assignor, although such assignee may not have received any notice of such equities at the time. (*See the opinion of Judge Strong, in Wood v. Perry*, 1 Barb. 131; 1 Comyn on Contracts, 197.)

II. The plaintiff Reeves stands in the same position in relation to the defendant, that Folsom would if he had not assigned the contract. (*See cases last cited.*)

III. If Folsom would have been compelled to pay the future advances under the agreement of the 12th of March, 1857, before he could exact a deed, then the plaintiff was bound to pay them.

IV. When Kimball took the two notes, \$100 and \$101.75, and advanced the \$50, and included \$84 of interest on the contract, he acted upon the faith of the agreement of the 12th of March, knowing that he had a right to exact it before he could be compelled to give a deed.

V. When the defendant took the notes and gave the extension of the contract, he was told by Folsom that Reeves was to take care of the notes.

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VI. Reeves agreed to indorse the notes of Folsom up to \$800, and he only indorsed \$600. If he had taken care of these notes, he would have fulfilled his agreement.

By the Court, MULLIN, J. The important question in this case is, whether the defendant has a better right to retain the title of the premises in question until he is paid his advances made in pursuance of the agreement of the 12th of March, 1857, than the plaintiff to a deed of said premises on paying the unpaid purchase money only. The agreement that such advances should be a lien on the property, was made over two years before the plaintiff acquired any interest whatever in the contract or premises. Folsom was left in possession of the contract and sold the same, for a valuable consideration, to the plaintiff, who did not then know of the arrangement that future advances should be a lien on the contract or the title. The plaintiff went into possession after his purchase, paid interest on the contract, and the defendant knew that the plaintiff was going to assist Folsom pecuniarily, and that he (Folsom) wanted the extension for that purpose. In other words, the defendant was informed, on the 1st of March, 1859, that the contract of the 2d of March, 1857, or the premises covered by it, were to be used in some way to secure the plaintiff for advances about to be made to Folsom. The defendant is entirely silent in regard to any claims he has beyond the amount specified in the contract, suffers the plaintiff to go into possession, and pay interest for some eighteen months, and now insists that his is a superior equity to the plaintiff's, by which he can hold the title until his advances are paid. It is probable that all the advances claimed by the plaintiff were made before any equity of the defendant attached. If so, then the latter is only chargeable with keeping silence when, by speaking, he could have prevented the plaintiff from being led into the purchase of the contract. But before

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entering on these investigations of these equities, it is important to ascertain whether the plaintiff was a *bona fide* purchaser for value paid. If he was not, that puts an end to any equity he may have to relief. There is no evidence that the plaintiff purchased with any fraudulent design. I have already remarked that he had no notice of any lien of the defendant, beyond the purchase money. And the knowledge that he had made advances to Folsom after the 2d of March, 1857, cannot, it seems to me, be construed into notice of the lien, or of the agreement that he (the defendant) should have a lien for such advances.

It only remains to inquire whether he was a purchaser for value paid. The referee found that he was not, having taken the contract in payment of a precedent liability. The contract was to be paid for "*by applying,*" as the referee found, "*the same towards the payment of certain notes of said Folsom which had been indorsed by said Reeves.*" By this language, I understand the referee to mean that the plaintiff assumed to pay certain notes which had been previously made by Folsom and indorsed by the plaintiff, in payment of the purchase price of the land contract. If such are the facts, it follows that, before the purchase of the contract, the plaintiff was the surety of Folsom for an amount equal to the purchase price of the contract. He was indorser, contingently liable if the paper had not matured, absolutely liable to the holder if the proper steps had been taken to charge him. In either case, Folsom was liable over to him if he paid the notes. By the agreement of purchase he ceased to be a surety; he became the principal debtor, as between him and Folsom, and absolutely bound to pay the notes, whether he was or was not charged as indorser. There was no precedent debt due from the plaintiff to Folsom. If he had been charged as indorser he did owe the holder, but it was not his own debt he paid when he paid the note, so far as Folsom was concerned. I see no way in which the transaction can be

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treated as the payment of a precedent debt or liability, in that sense which deprives him of the character of a purchaser for value. It seems to me he was most clearly a *bona fide* purchaser, and that his agreement to assume the payment of the notes was parting with value, so as to make him a *bona fide* holder for value paid.

The next most important question is, is the defendant's equity superior to that of the plaintiff, because it is the oldest in time; and is such equity so far superior to that of the plaintiff as to override the rights and equities of the plaintiff, being a *bona fide* purchaser, for value? The case of *Bush v. Lathrop* (22 N. Y. 535) would seem to be decisive of the question. In that case the law is declared to be that the equities existing between assignor and assignee of a chose in action, not negotiable, attend the title transferred to a subsequent assignee for value and without notice. The latter takes the exact position of his vendor. The parties do not stand in the relation stated in the proposition; but the reasoning of the learned judge who gave the opinion in the case, cited by him to sustain himself, shows that the principle was 'intended to reach and apply to parties occupying the relation of the plaintiff and defendant in this case.

While the law undoubtedly is as stated by Judge Denio in the case cited, I must nevertheless say that it does not commend itself to my sense of right and justice. When a vendor of land agrees to make advances to the vendee, which, by an independent arrangement, are to be a lien on the land, and leaves the contract in the vendee's hands, and the same is sold to a *bona fide* purchaser for value paid, without notice, the equities of the latter are, it seems to me, with the most profound respect for the learned judge who has put forth the converse of the proposition as the law, superior to those of the vendor, and should be upheld. If I am right in supposing the principle sug-

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gested applies to this case it is decisive of it, and the judgment must be affirmed.

There is no estoppel in the case. The defendant was not bound to find the plaintiff and notify him of his rights. Folsom knew all about his rights, and it was his duty to disclose the facts to the plaintiff. Had the plaintiff called on the defendant before the purchase of the contract and communicated to the defendant that he was about to purchase the contract, it would have been the defendant's duty to speak, and his silence would have estopped him. I am of opinion the judgment is right and should be affirmed.

Judgment affirmed.

[OSWEGO GENERAL TERM, July 14, 1868. *Mullin, Morgan and Bacon*, Justices.]

SHULL vs. OSTRANDER.

After an agreement for an exchange of horses had been made between the parties, and consummated by a delivery, the plaintiff returned the horse he had received, and, after rescinding the first agreement, a new bargain was made, by which the defendant sold his horse to the plaintiff, for \$100. *Held* that the representations and warranties made by the defendant on the first bargain did not enter into and form a part of the second, so as to constitute a defense to an action for fraud or breach of warranty.

The general rule is, that the representations or affirmations constituting a warranty, or the representations which are charged to be false, must be made during the negotiations for the sale.

A warranty must be made during the treaty, or at the time of the sale; or at least, before the performance of the substantial terms thereof.

APPEAL by the defendant from a judgment of the county court of Herkimer county, affirming a judgment of a justice of the peace.

The action was for fraud or breach of warranty on the sale

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of a horse. The parties had exchanged horses. The defendant representing his horse to be six years old, and sound, except a bad cold, and good to draw. She was found not to be as represented, and that trade was given up, and the plaintiff took both horses, and gave his note to the defendant for \$100. No new representations were made when the last trade was completed, except the allegation of the defendant that the stiffness of the mare, complained of by the plaintiff, was from a cold, which she would get over in a few days. The jury, upon these facts, found a verdict for the plaintiff, for \$40; and from the judgment entered thereon, by the justice, the defendant appealed to the county court; which affirmed the judgment.

S. & E. Earl, for the appellant.

I. If we treat the action as founded upon the warranty alleged in the complaint, the judgment cannot be upheld. The plaintiff, at the trial, seems to have treated this as an action upon warranty, as he did not prove, or make any effort to prove, any fraud, before he rested his case. 1. The complaint sets forth two distinct and complete bargains, to wit, an exchange of horses on the 26th day of December, upon which the plaintiff gave his note to the defendant for \$55; and upon which it may be claimed a warranty is alleged to have been made by the defendant; and another bargain, about two days after this, by which the former trade was rescinded, and the plaintiff took both horses and gave the defendant his note for \$100, the transaction being in substance a sale of the horse for the \$100. If any warranty is alleged on this last trade, it is only in reference to the soundness of the horse. It is not alleged that any representations were made as to age or other qualities; and the action is based upon this last trade, and the liabilities of the defendant, if any, grow out of it. 2. The action cannot be sustained by the warranty which it is claimed was made on the first trade. That was a distinct trans-

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action, complete in itself, and with its termination all negotiation between the parties terminated for the time. It is not a case of continuous negotiations ending in a trade or sale; but each trade or bargain is distinct. As to the first trade, all the representations were made upon the 26th day of December. As to the second, all the representations were made on the day the note was given and the two horses were taken. (*Wilmot v. Hurd*, 11 *Wend.* 586. 1 *Strange*, 414.) 3. It is not claimed, and cannot be claimed, that the proof shows any warranty on the second trade. 4. No breach of warranty could be claimed as to the stiffness, as that certainly was adjusted on the second trade; and besides, the plaintiff knew of it and demanded no special warranty against it. (*Schuyler v. Russ*, 2 *Vaines*, 202.) 5. But even if we are so far wrong, we are right in saying that this action cannot be sustained upon any warranty, for the reason that upon the second trade, and as a part thereof, the plaintiff agreed to take the horse "as she was." The plaintiff testified on his cross-examination that he said "she is mine now, let come what will." The defendant testified that "he was to take the mare as she was;" and in this he is not contradicted by the plaintiff. As the plaintiff was in court, it must be taken as true, or he would have contradicted it. These two expressions must be held to be tantamount, and they are equivalent to saying that the plaintiff was to take the mare with "all faults, sound or unsound." (*Baglehole v. Walters*, 3 *Camp.* 154 to 156. *West v. Anderson*, 9 *Conn.* 107. *Hilliard on Sales*, 235.) Hence there could not be any recovery rightfully for breach of warranty.

II. We claim that the complaint is for fraud. It has all the elements of such a complaint, and no one on reading it would suspect that it was for a breach of warranty. But if this be treated as an action for fraud, the judgment cannot be upheld. 1. The action must be sustained, if at all, for reasons above stated, by false representations made

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at the time of the second trade. 2. At this trade there were no representations of any kind made, except as to the stiffness, and in reference to that, there is no pretense of fraud. 3. There is not a particle of testimony by any witness produced by the plaintiff showing, or tending to show, any fraud on the part of the defendant on either trade, and if it is proved at all, it is by the defendant himself. 4. We also claim, as we have above claimed in reference to the warranty, that on the second trade he agreed to take the horse "as she was" with all her defects, and hence that he cannot recover any damages for the alleged fraud. (*Baglehole v. Walters*, 3 Camp. 154 to 156. *West v. Anderson*, 9 Conn. 107. *Hilliard an Sales*, 235.) 5. As there is no proof of any fraud, it cannot be and should not be presumed. (*Fleming v. Slocum*, 18 John. 403. Hence we say upon the undisputed evidence in this case, the judgment cannot be sustained, whether this be treated as an action for fraud or for breach of warranty.

III. The justice erred in allowing the evidence which was objected to. If this be treated as an action on the warranty, then there had been no proof of any warranty as to the age, on the second trade. If it be treated as an action of fraud, there was no fraud as to the age.

IV. The justice erred in denying the motion for a nonsuit: If this was an action of fraud, upon the ground that no fraud was proven; if it be treated as an action of warranty, on the ground that no warranty was proved on the second trade.

D. Pratt, for the respondent.

I. The warranty and breach are found by the verdict of the jury upon conflicting testimony. The county court was therefore right in not disturbing their verdict.

II. The modification made in the trade at the second interview between the parties was based upon the stiffness of the mare, which the defendant then insisted was only

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temporary. In other respects the trade and the entire undertakings were left unimpaired. (11 *Wend.* 584.) 1. The defendant refused to cancel the trade, but in consideration of the temporary stiffness, as he called it, took the \$100 note, instead of the horse and \$55. 2. In all other respects the former trade was confirmed. 3. At all events it was a question of fact for the jury, upon the evidence, whether that was the intention of the parties or not.

III. There was no question of variance between the complaint and proof raised at the trial. The question is, therefore, simply whether the evidence was sufficient to support the verdict.

IV. The objection to the testimony of Sally Shull, as to the representations made at the first trade, was not well taken. As the first trade was not canceled, but confirmed in most of its provisions at the second interview, her testimony was clearly competent to prove a warranty.

By the Court, MULLIN, J. It is difficult to say what the cause of action is that is set out in the complaint. Both fraud and warranty are alleged, and perhaps the plaintiff is entitled to have his judgment sustained, provided he has shown himself entitled to recover for either.

The first contract was fully executed by the delivery to each party of the property to which he was entitled under the contract, and a new and independent agreement entered into in reference to the same property. If the plaintiff was now suing for breach of warranty on the first sale it is quite likely he would be entitled to recover, as there is but little question but that the defendant warranted his horse; nor but that such warranty was broken. But it is not claimed that this action was brought for breach of warranty, or fraud in the first sale or exchange. We must inquire, therefore, whether there was fraud or warranty in the second sale. The second sale was made

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at the detendant's house, after the plaintiff had taken back the horse he received of the defendant, and informed the defendant that he thought the mare was stiff. The defendant said he thought not; after driving her he said he thought she was a little stiff, caused from cold, but thought it would pass off in a few days. The new bargain was then made, and the plaintiff took with him both horses, and gave the defendant his note for \$100. Confining the negotiations of the parties to the time when the second bargain was made, there was nothing said by the defendant from which a warranty of the horse could be inferred, or an intention to warrant. The plaintiff's counsel, to get rid of this difficulty, insists that the defendant is liable for the representations made, and the warranties given, in the first sale, inasmuch as the plaintiff must be held to have made the second in view of, and in reference to, what had been said by the defendant on the first sale. That the second bargain was but a modification of the first, and not a new and independent agreement.

The second bargain was a new and distinct agreement whereby the first was rescinded, and new obligations assumed by the parties wholly inconsistent with the first. The first was an exchange of horses, the second was a sale, by the defendant, of his horse, after rescinding the first, for the sum of \$100.

The question now is, do the representations and warranties given on the first enter into and form a part of the second. If they do, the judgment is right, and should be affirmed; if not, it must be reversed. The general rule is, that the representations and affirmations constituting the warranty, or the representations which are charged to be false, must be made during the negotiations for the sale (1 *Para. on Cont.* 463, note c.)

In *Chitty on Cont.* 458, it is said the warranty must be made during the treaty, or at the time of the sale, or at

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least before the performance of the substantial terms thereof. In *Wilmot v. Hurd*, (11 Wend. 584,) it was held that, generally, a warranty of an article should be made at the time of the sale, but if, when parties are first in treaty respecting the sale, the owner offers to warrant the article, the warranty will be binding, although the sale does not take place until some days afterward.

In *Hopkins v. Tanqueray*, (26 Eng. L. & E. 254,) the defendant owned a horse sent to Tattersall to be sold at auction. On the day previous to the sale, he saw the plaintiff at the stables examining the horse, and said to him: "You have nothing to look for, I assure you; he is sound in every respect;" upon which representation the plaintiff expressed his satisfaction as to the soundness of the horse, and examined him no further, and on the next day bid him off for a large price, at the auction. *Held* this was not a warranty, although the horse proved to be unsound. The court say there was no evidence to go to the jury of a warranty, the representation not being made in the course of, or with reference to, the sale. Can we say that the representations made with reference to an exchange of horses would have been made had the second bargain been the one under discussion? It seems to me not. When that bargain was concluded, the rights of the parties were fixed, and a new bargain, made in regard to the same property, must rest on its own facts and circumstances. Before the second bargain was made, the plaintiff had discovered defects in the horse, and it was on account of them that the defendant entered into the new agreement. It would be most unjust to the defendant to hold him to a warranty given on the first trade, when it was to get rid of it he entered into the second. I am, therefore, of the opinion that the representations made during the negotiation for the first bargain could not be considered as entering into, or forming a part of the new

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one; and that there is, therefore, no evidence of fraud or warranty in the new sale to support the judgment.

The judgment of the county court, and of the justice, should therefore be reversed.

Judgment reversed.

[OSWEGO GENERAL TERM, July 14, 1865. *Allen, Mullin, Morgan and Bacon, Justices.*]

 SHERWOOD vs. PRATT.

Where one who has signed his name as an attesting witness to the execution of an instrument, did so without the knowledge or consent of the parties, the instrument may be proved as if there were no subscribing witness.

The signature of a subscribing witness is not *conclusive* upon the parties to the instrument. It is only *prima facie* evidence that the witness was called in by them; and the presumption arising from it may be contradicted.

And for that purpose, parol testimony may be received; the object of the proof not being to contradict, or vary, the written agreement, but merely to show that its execution was not attested in a particular way.

APPEAL, by the plaintiff, from a judgment entered upon the report of a referee. The action was in the nature of replevin.

The complaint alleges that on or about the 27th day of July, 1867, the defendant took and wrongfully detains, from the plaintiff, certain articles of personal property belonging to the plaintiff, of the value of \$600. The defendant, by his answer, admits the taking and detaining of the said property, and alleges that he took the same upon a chattel mortgage executed by one J. W. Sherwood, and detained it for the purpose of selling under the said mortgage. The cause was referred to Harlo Hakes, Esq., and was brought on for trial on the 12th day of May, 1868.

J. W. Sherwood was indebted to the plaintiff in the

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sum of \$615, and had given to him a mortgage on the property mentioned in the complaint. Upon said mortgage appeared the name of the referee as a subscribing witness, which had been placed there without the knowledge or request of the plaintiff, or the mortgagor. At the commencement of the trial, the plaintiff attempted to prove the execution of the mortgage by himself as a witness; when the defendant objected, on the ground that there was a subscribing witness to the mortgage. The plaintiff then offered to show that the name of the subscribing witness was placed upon said mortgage without the knowledge or consent of himself or the mortgagor. The plaintiff conceded that the subscribing witness to the mortgage so subscribed it at the time of the execution of the mortgage. The offer was objected to by the defendant's counsel, on the ground that having been subscribed by the witness at the time of the execution of the mortgage, it should be deemed to have been adopted by the parties. Second. That it would be an alteration or contradiction of the instrument, and, in effect, striking out the name of the subscribing witness. Objection sustained by the referee, and the plaintiff's counsel duly excepted. Thereupon the plaintiff's counsel announced that, under the ruling, he was unable to proceed further, for the reason that he should be obliged to call the referee as the subscribing witness. The defendant's counsel moved for a nonsuit on the question of the plaintiff's right to recover. Motion granted. The plaintiff's counsel then waived the necessity of calling witnesses to prove, and admitted, that the property in question was taken from the possession of the defendant by the sheriff, pursuant to the proceedings in this action, on the first day of August, 1867, and delivered to the plaintiff, and was not reclaimed by the defendant, but was retained by the plaintiff, and that the value of the property was \$600. The referee thereafter made his report, by which he found that the plaintiff

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had failed to establish a cause of action against the defendant herein, or any right to the possession of the personal property mentioned in the complaint. That the value of the property was \$600; and that the defendant was entitled to the possession of said property, and to the return thereof, and in case a return thereof could not be had, he would be entitled to recover the said value thereof, with interest from the time of the taking. And judgment was entered accordingly.

Birrell & Soule, for the appellant.

I. The plaintiff was a competent witness to prove the execution of the mortgage. If he saw the mortgagor sign his name to the mortgage, his testimony to that fact would be as good evidence as it is possible to produce, and better evidence than was received in the case of *Hall v. Phelps*, (2 John. 451,) and approved in *Mauri v. Heffernan*, (13 id. 74,) and 3 *Cowen & Hill's Notes*, 28, 29.

II. The person whose name appeared upon the mortgage as a subscribing witness was not such witness within the meaning of the law. Neither party to the mortgage had any knowledge that his name was subscribed thereto, and it is well established that no person can make himself a subscribing witness to an instrument without the knowledge or request of the parties to it; that is, no person can, by voluntarily placing his name upon an instrument as a subscribing witness, compel the parties to the instrument to call him to prove its execution. (2 *Phil. Ev.* 201, 214. 2 *Cowen & Hill's Notes*, 362, 387, *marginal*. 1 *Stark. Ev.* 328. 1 *Greenl. Ev.* 569. 2 *Wend.* 576. 6 *Hill*, 303. 2 *Wait's Law and Practice*, 431.)

III. The fact that the referee placed his name as a subscribing witness to the mortgage, at the time of its execution, is not conclusive that either of the parties to the mortgage knew that it was there; and most certainly they could not adopt him as the subscribing witness with-

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out their knowledge. To produce that effect there must be an agreement to so regard him, made and entered into by the parties, after the fact that he had so subscribed his name came to their knowledge. When it is conceded that the referee placed his name to the mortgage without the knowledge or request of the parties thereto, it must also be conceded that at that time he was not a legal subscribing witness. He could become such at a subsequent time only by the agreement of the parties, which agreement should be proved by the person asserting its existence, before either party to the mortgage should be compelled to call him to prove its execution.

Where the existence of a fact or relation, continuous in its nature, has once been proved, a presumption of its continuance arises. (1 *Stark. Ev.* 55. 2 *id.* 688. 1 *Phil. Ev.* 449. 1 *Cowen & Hill's Notes*, 458.) By a parity of reasoning, when it has been proved that an apparent fact or relation of the same nature did not exist at the time it was presumed to have existed, the presumption must also arise that it did not subsequently exist.

IV. The name of the subscribing witness is no part of the mortgage.

V. The plaintiff should have been allowed to prove that the name of the so-called subscribing witness was placed upon the mortgage without the knowledge or request of the parties thereto. 1. The defendant objected to his proving the execution thereof by any other person than the one whose name appeared thereon as a subscribing witness. 2. As the name of the referee appeared upon the mortgage as a subscribing witness, the presumption arose that he was such in fact and in law; and the plaintiff should have been allowed to rebut that presumption, to relieve himself of the seeming necessity of proving its execution by him.

VI. The defendant was not entitled to a judgment for a

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return of the property; he did not claim a return in his answer. (*Code*, § 277.)

VII. The defendant was not entitled to a judgment for the market value of the property. Allowing him all he claimed, he had but a special property therein, to the amount of his lien, by virtue of his mortgage. As no evidence was produced to show what that amount was, the finding of the referee, and the judgment entered in pursuance thereof, are most clearly erroneous. (*Seaman v. Luce*, 23 Barb. 240. *Spoor v. Holland*, 8 Wend. 445.)

VIII. In this case no trial was had. The plaintiff was turned out of court before he could introduce any material evidence to support his cause of action. The mortgage was the foundation of his title to the property, and when he was prevented from proving the execution of that, he, of course, could not proceed in the trial of the cause. It was impossible for the plaintiff to offer any better evidence of the execution of the mortgage than he did. It could not have been proved by the referee as subscribing witness, because he was not such witness. It is the legal duty of the courts to see that issues of fact therein are fully and fairly tried. (*Adsit v. Wilson*, 7 Howard's Pr. 64.) The court cannot fail to see that the trial of this cause was prevented by the defendant and the erroneous rulings of the referee. And it is submitted with confidence that the plaintiff will be allowed an opportunity to establish his title to the property mentioned in the complaint; and that if the defendant has any lien on said property by virtue of his alleged mortgage, he shall be required to establish it by competent evidence.

Geo. B. Bradley, for the respondent.

I. In view of the fact that the witness to the mortgage subscribed as such at the time of the execution of the instrument, the plaintiff's offer to show that the subscription by the witness was without the knowledge or request

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of the parties was incompetent, and properly excluded.

1. The fact that the witness subscribed at the time of execution made him a subscribing witness, and conclusively established his relation as such to the instrument. (*Hollenback v. Fleming*, 6 *Hill*, 303 to 305.) In such case the execution by the party and subscription by the witness are

considered parts of the same transaction. (*Id.*) 2. And when the instrument became effectual by delivery, the subscription by the witness was a part of it, in so far that it provided upon its face the mode of proof of execution, and it must be deemed to have been delivered and accepted with a view to the consequences and effect relating to the establishment by proof of the execution.

3. The mortgagor, certainly, after delivery of the instrument thus witnessed, cannot insist that the witness was not a subscribing witness; nor could the mortgagee repudiate that relation of the witness after acceptance. The parties, at the time of and by delivery and acceptance, must be deemed to have adopted the subscription by the witness. It follows that where an instrument is delivered and accepted with the name of a subscribing witness thereto, who is personally competent to be such, the relation as such of the witness cannot be defeated. And especially is that so when the execution by the party cannot be distinguished, in point of time, from the subscription by the witness. Any other rule might not only be prejudicial to a party to the instrument, but would open the door to confusion, by producing question of a fact whenever a want of recollection of a party would permit. The rule would be different if it should appear that the witness did not subscribe before delivery; then the subscription would be no part of the instrument as delivered. 4. The subscription at the time of execution is so much a part of the instrument that to attempt to prove that the witness' name appeared there without request, would be an attempt to reform or alter it. This subscription by a witness is so

important a feature of the paper, in respect to authenticating its execution, that at common law the necessity of proof by the witness cannot easily be obviated in respect to anything relating to the execution. (*Hollenback v. Fleming*, 6 *Hill*, 305. *King v. Smith*, 21 *Barb.* 158. *Jones v. Underwood*, 28 *id.* 481.) And the fact that the subscribing witness was referee, (having been made so by consent,) would not have enabled the party to resort to secondary evidence of execution. (*Jones v. Phelps*, 5 *Mich.* 218. *Patterson v. Schenck*, 3 *Greenl.* 434.) This question, however, is not presented in this case.

II. In any view, the evidence offered could not tend to show that Harlo Hakes was not in fact a subscribing witness. The offer was not broad enough. 1. The theory that a subscribing witness is one selected by the party or parties to the instrument, and subscribes as such by request, express or implied, is satisfied. In this case the witness subscribed at the same instant that the mortgagor executed the mortgage, and it was delivered and accepted thus subscribed. The presumption is, that the parties knew, when the mortgage was delivered and accepted, what the mortgage contained—that the witness' name appeared thereon; and the presumption is as strong in respect to that as to any part of its terms. And they must be deemed to have then adopted the witness as legitimate. This presumption is a legal one, not susceptible of repulsion collaterally by oral evidence, any more than that relating to any other thing appearing in the instrument. 2. The offer to prove that the subscription, although made at the time of the execution of the paper, was so made without the knowledge or request of the parties, if allowed, would have failed to show that the parties, at the time of delivery and acceptance, were not aware of the subscription, and adopted it. The evidence would have been practically useless. The offer was too narrow. (*Dickinson v. Smith*, 25 *Barb.* 102 to 108. 3 *N. Y.* 47, 50. 38 *Barb.*

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417.) The offer relates entirely to the time of the act of subscription by the witness. The parties may have known it, a moment after it was made, consistently with the truth of the evidence offered. 3. The presumption is, that the person whose name appears subscribed as such to an instrument is a subscribing witness. The plaintiff has the affirmative, and is required to exclude the presumption, by proof that the person was in fact such witness. (*Whitaker v. Salisbury*, 15 Pick. 544. *Sigfried v. Levan*, 6 S. & R. 311. 2 *Cowen & Hill's Notes*, 381, 3d ed.) The evidence may be conceded to be true, and the presumption offered is not met or repelled.

By the Court, JAMES C. SMITH, J. An instrument, purporting to be attested by a subscribing witness, may be proved as if there were no subscribing witness, where the person who has put his name as attesting witness, did so without the knowledge or consent of the parties. (2 *Phil. on Ev.*, 4 *Am. ed.*, with notes, 499, 503. 2 *Wait's Law and Pr.* 431.) In the present case, the plaintiff's counsel offered to prove that the chattel mortgage produced by him at the trial, was signed by the subscribing witness without the knowledge or request of either of the parties to the mortgage. When he made the offer, he conceded that the mortgage was so subscribed by the witness, at the time of its execution. The case states that the offer was objected to on two grounds: (1.) That having been subscribed by the witness at the time of the execution of the mortgage, it was deemed to have been adopted by the parties. (2.) That it would be an alteration or contradiction of the instrument, and, in effect, striking out the name of the subscribing witness. In sustaining the objection, the referee, I think, fell into an error. The objection rests, mainly, on the fact that the witness subscribed the mortgage at the time of its execution. But that fact is of no moment, if it be true, as the plaintiff

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offered to show, that the witness so subscribed without the knowledge of either of the parties. To hold otherwise, would be to treat the signature of the witness as conclusive upon the parties; whereas it is only *prima facie* evidence that the witness was called in by them, and the presumption arising from it may be contradicted. And for that purpose parol testimony may be used, since the object of the proof is not to contradict or vary the written agreement, but merely to show that its execution was not attested in a particular way.

There should be a new trial, and as the present referee is the subscribing witness, and his testimony will probably be needed on the trial, another referee should be appointed in his place.

[MONROE GENERAL TERM, December 7, 1868. E. Darwin Smith, Johnson and J. C. Smith, Justices.]

DENNIS vs. RYAN.

Where a party, knowing that a certain act does not constitute a crime, procures another to be indicted for a crime; or where he supposes and believes that such act, if done by another, would constitute a crime, and falsely and maliciously accuses such other of the commission of the act, and procures him to be indicted; an action for malicious prosecution lies.

Thus, an action will lie for the malicious prosecution of the plaintiff by the defendant in causing the former to be indicted and tried for the crime of forgery, alleged in the indictment to consist in the erasure, from the back of a money bond which the defendant was under obligation to pay, of an indorsement of a payment thereon.

A charge that such an action cannot be maintained by the plaintiff, unless the jury are satisfied, from the evidence, that the accusation made by the defendant, on which the indictment was found, was known by him to be false and unfounded; but that if he made the complaint, knowing it to be false and unfounded, and by that means procured the plaintiff to be indicted and brought to trial, the action will lie, even though the charge made did not constitute the crime alleged, or any crime—is not erroneous.

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The act charged, if true, would not constitute a forgery of the bond, because the indorsement is no part of the bond, but only evidence of a payment thereon.

It is impossible for a party to make for himself probable cause, out of his own falsehood. *Per* JOHNSON, J.

THIS was an action for malicious prosecution, and false imprisonment, tried at the Cayuga circuit in October, 1870. At the trial, the plaintiff proved that the defendant procured an indictment for forgery to be found against him, on which he was tried and acquitted. The charge was, that he, the plaintiff, had committed a forgery by erasing a payment indorsed on a bond and mortgage held by the plaintiff against the defendant. To obtain the indictment the defendant stated to the district attorney, and afterwards swore on the trial of the indictment, that on two several occasions he heard the plaintiff admit, substantially, that he did make the erasure. The evidence of these admissions was substantially all the evidence to charge the plaintiff with the crime.

The plaintiff, on his trial, showed that he did not only not make the statements sworn to by the defendant, but in fact the alleged payment never had been indorsed.

The plaintiff, after his acquittal, brought this action, and proved the foregoing facts.

At the conclusion of his case the defendant moved for a nonsuit, on the following grounds, viz: The facts charged by the defendant, on which the indictment was found, to wit, the erasure of the payment, constituted, at law, no crime, and the defendant was therefore not liable for his acts.

The motion was denied, and at the conclusion of the case the court charged the jury, among other things, that "a party who corruptly and maliciously institutes a prosecution of this kind, cannot screen himself behind the allegation that the alleged offense was not a crime, and that the plaintiff was injured to the same extent as though a crime were charged in the indictment."

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The defendant excepted to this part of the charge, and requested the court to charge that the grand jury having found an indictment for what was not a crime, the defendant was not liable for the arrest and prosecution of the plaintiff. The court declined so to charge, and the defendant excepted to the refusal.

The plaintiff had a verdict, on which judgment was duly entered, and the defendant appealed from the same to the general term; where the cause came on to be heard on a case and exceptions.

M. V. Austin, for the appellant, argued the following among other propositions:

There being no crime charged in the indictment against the plaintiff, the defendant is not liable, even if he made false statements to the district attorney, or prosecuted the indictment by the same means; such statements were entirely immaterial, and did not amount to false charges of a crime. And he cited the following, among other authorities: *Jackson v. Dawes*, (5 Cranch, 283;) *Blunt v. Little*, (3 Mason, 102;) *McNeeley v. Driscoll*, (2 Blackf. 259;) *The State v. Thornburg*, (6 Iredell, 79;) *The State v. McLaren*, (1 Aiken, 311;) *The State v. Norton*, (3 Zabriskie, 33.)

F. D. Wright, for the respondent, among other propositions, made the following points:

I. An action will lie for a malicious prosecution, even although the plaintiff could not have been convicted for the crime of forgery on the indictment, and will lie for the malicious prosecution of a bad indictment. This case is different from the case where the party innocently and truly states facts to a magistrate which do not amount to a felony, and the officer, without any fault on the part of the complainant, issues a warrant. The case at bar is one where the defendant deliberately and maliciously set the machinery of the law in motion, and followed the

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complaint up by deliberate perjury, on the trial of the indictment.

II. The court and jury had jurisdiction of the plaintiff, and of the alleged offense; and it is wholly immaterial whether the indictment was good or bad, so long as the defendant obtained it by willful and malicious false statements. In such a case he is clearly liable. He cited the following authorities: 1 *Archbold's Crim. Practice and Pleadings*, 470; 1 *Hilliard on Torts*, 470; *Forest v. Collins*, (20 Ala. 170;) *Collins v. Lord*, (7 Blackf. 416;) *Morris v. Scott*, (21 Wend. 281;) 1 *Am. Crim. Cases*, 208, 209; *Prado v. Barrett*, (1 *Ld. Raym.* 81;) *Chambers v. Robinson*, (1 *Strange*, 691;) *Hicks v. Fentham*, (4 *T. R.* 347.)

By the Court, JOHNSON, J. The action was for the malicious prosecution of the plaintiff by the defendant, in causing the plaintiff to be indicted and tried for the crime of forgery, in altering a certain bond for the payment of money, which bond the defendant was under obligation to pay. The forgery was alleged in the indictment to consist in the erasure, from the back of the bond, of an indorsement thereon, of a payment of \$45. It would seem pretty clear that the act charged, if true, would not constitute a forgery of the bond, as the indorsement was no part of the bond, but only evidence of a payment thereon. It is not very material, in this case, to consider whether it constituted the crime of forgery at all, or if so, what was the instrument so forged, because the indictment charged it to be a forgery, and the plaintiff was obliged to go to trial upon it, and defend himself against the charge. He was prosecuted for that crime in fact and in law, and was compelled to answer and defend. The point made by the counsel for the appellant, that the defendant is not liable for the prosecution, if he stated the facts truly and honestly to the district attorney, and to the grand jury, and was advised by the district attorney that such facts would

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constitute the crime of forgery, and the grand jury found the indictment upon such insufficient evidence, does not arise in the case.

On looking at the charge of the judge to the jury, it will be seen that the judge expressly charged that the action could not be maintained by the plaintiff, unless they were satisfied, from the evidence, that the accusation made by the defendant, on which the indictment was found, was known by him to be false and unfounded; but that if he made the complaint, knowing it to be false and unfounded, and by that means procured the plaintiff to be indicted and brought to trial, the action would lie, even though the charge made did not constitute the crime alleged, or any crime. The jury, by their verdict, have found that the defendant, when he made the charge, knew that the facts on which he based it were not true, but wholly false. The appellant, by his counsel, excepted to this portion of the charge.

The charge was correct. The rule is, that where a party, knowing that a certain act does not constitute a crime, procures another to be indicted for a crime, or where he supposes and believes that such act, if done by another, would constitute a crime, and falsely and maliciously accuses such other of the commission of the act, and procures him to be indicted, the action for malicious prosecution lies: 1 *Am. Lead. Cases*, 281—where nearly all the authorities, English and American, are collected. And in our own court it has been held that this action would lie against a party who falsely and maliciously prosecutes another, although the court, in which the action was brought, was utterly destitute of jurisdiction in the matter. (*Morris v. Scott*, 21 *Wend.* 281.)

In such a case, the gravamen of the action is the malice and falsehood, and the arrest and trouble of defending, are the consequences. A case like this is much stronger than that, because there the question arises, whether there

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has been in law any prosecution. But in a case like this, no such question can arise. The court had jurisdiction, and the party was in law prosecuted, even though the pleadings were defective, and showed upon their face that the charge could not be sustained.

The objection, that the plaintiff was allowed to prove what the defendant testified to before the grand jury, is wholly unfounded. No such evidence was given by the plaintiff. He proved by the district attorney what statements the defendant made to him when entering the complaint, and what he testified to on the trial of the indictment. The court ruled that the plaintiff might prove the defendant's testimony before the grand jury; but it is apparent that no such testimony was given, and the exception is of no avail, as the mere ruling worked no injury to the defendant. Upon a careful examination of all the testimony in the case, it appears that the jury were well warranted in finding, as they must have found, under the charge, that the charge made by the defendant, on which he procured the indictment to be found, was a sheer fabrication, and most wickedly and maliciously made.

The testimony by which the defendant attempted to sustain the truth of the charge on this trial, is most incredible. This finding puts the question of probable cause wholly out of the case upon the merits. It is impossible for a party to make for himself probable cause out of his own falsehood.

The judgment is right, and must be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, January 2, 1872. *Mullin, Johnson and Talcott, Justices.*]

IN THE MATTER of the acquisition of land by THE POUGH-
KEEPSIE AND EASTERN RAILROAD COMPANY, from Francis
A. Palmer, claimant and appellant.

P. was the owner of a railroad, four or five miles in length, leading from and appurtenant to, an iron ore bed owned by him, which road connected with the Harlem railroad at B., where it terminated. The respondents constructed a railroad extending from Poughkeepsie to B. At a point about two and a half miles from B. they intersected or struck the road of P., and from thence to B. had located upon, and proposed to take P.'s road-bed, embankment, excavations, rails and ties, leaving him no outlet from his ore bed, except by constructing a new road in place of the portion proposed to be taken. The commissioners of appraisal appointed in proceedings by the respondents, under the statute, to acquire the title to the land of P. proposed to be taken, in their allowance of damages, named but two items, viz., the value of the land taken by the respondents, in its present condition, including grading done thereon, and the value of the iron and ties constituting the track as at present laid down; excluding damages arising from depreciation in value of that part of P.'s railroad not taken; also damages to arise from any depreciation in value of the ore bed by cutting off existing accommodations for transporting ore; and damages arising from delay while the respondents were using his road, and during the time required by P. to construct another road, &c.

Held, on appeal from such appraisal, 1. That confining the damages to the actual value of the land taken, and to the actual value of the ties and track as at present laid down, was not that just compensation intended by the constitution and the statute for the injury that the taking of the property, for the purpose intended, would cause the land owner, and for all the injuries he would suffer.

2. That if P.'s ore bed, and the remaining section of his railroad, were depreciated in value by such taking, then he should have been allowed damages for such depreciation.

A PPEAL from the appraisal of commissioners appointed in proceedings under the statute (*Laws of 1850, ch. 139*), by a railroad company, to acquire the title to real estate.

J. W. Edmonds, for the claimant.

R. F. Wilkinson, for the railroad company.

Matter of Poughkeepsie and Eastern Railroad Company

By the Court, P. POTTER, J. The claimant, Palmer, was the owner of a railroad of four or five miles in length, leading from, and appurtenant to, an iron ore bed, and extending from said ore bed to a place called Boston Corners, in the county of Columbia, at a place where it terminates, or connects with the Harlem railroad. The respondents have constructed their railroad extending from Poughkeepsie to the Connecticut line, at or near Boston Corners; and, at a point about two and a half miles from Boston Corners they intersect or strike the railroad of the appellant, and from thence to Boston Corners, have located upon, and propose to take, the appellant's railroad, bed, embankment, excavations, rails and ties; and the proceedings before us, are an appeal from the appraisal of commissioners appointed by proceedings under the statute.(a)

Though various questions were raised against the legality of the proceedings, the ground upon which the court have been moved to reverse the appraisal is the apparent injustice of the appraisement. At one terminus of the appellant's railroad he owns a valuable iron ore bed, from which 20,000 tons of ore can be taken annually. The engineer of the respondents testified, on the appraisal, among other things, as follows: "We could have made our line without touching Palmer's, but we used Palmer's because it was for the interest of our railroad." "To take this road would be a great saving to us of time in building our road. This is the principal reason for taking it." "Palmer has now, by means of his railroad, access from his mine to the Harlem railroad. He will not have access, after the Poughkeepsie and Eastern road is built, except by highway and by our railroad. The entire length of Palmer's railroad is $4\frac{1}{2}$ miles. We take 2 47-100 miles. Palmer can build another road parallel with the present one, for the use of his mine. To build and complete such new road would cost \$12,000 a mile."

(a) *Laws of 1850, ch. 139, §§ 13, 14, 18.*

Matter of Poughkeepsie and Eastern Railroad Company.

One Norton, on the part of the appellant, testified, "that with the present facilities of working the mine there would be a profit of \$1,00 a ton," and he says he made "an offer of a royalty of 75 cents a ton, to the owner. Without the facilities of railroad transportation, the mine would be worth nothing." There was conflicting evidence of the value of the property, and the commissioners certify to their own view of the property. But in their allowance of damages they name but two items, to wit, the value of the land taken by the company in its present condition, including grading done thereon, . . . \$9,451
 Value of iron and ties constituting track as at

present laid down,	13,049
Total,	<u>\$22,500</u>

This finding excludes the idea of damages arising from depreciation in value of that part of the appellant's railroad not taken; also from any possible depreciation to the ore bed by cutting off existing accommodations for transporting ore; also from delay while the respondents are using his road, and in the time required to construct another road by appellant, and other considerations, from which he must be damaged.

Confining the damages, as these appraisers have, to the actual value of the land taken, and to the actual value of the ties and track as at present laid down, it is not, in our opinion, that just compensation intended by the constitution and the statute, for all the injury that the taking of the property for the purpose intended, will cause the land owner, and for all the injuries which he will suffer. Such taking, it is clear, must necessarily affect injuriously the remainder of the appellant's railroad which is not taken. It is clearly shown that he cannot use that, without constructing another track from it to his ore bed, and this will cost him far more (as the evidence discloses) than is allowed him for the portion taken. It is clear that his ore

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bed must be diminished in value, by the taking this section of his railroad which is appurtenant to it; and for these injuries no damages have been awarded. The legislature surely did not intend that these injuries should be borne by the land owner. If the appellant's ore bed, and the remaining section of his railroad are depreciated, by this taking, then he should have been allowed for such depreciation. This has not been done. I think, therefore, that for this reason alone, without passing upon the other objections, the determination and report of the commissioners should be set aside, the commissioners discharged, and a new commission appointed to appraise all the damages the appellant will sustain, with \$10 costs.

Ordered accordingly.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, May 7, 1872. *Miller, P. Potter and Balcom*, Justices.]

GOODYEAR vs. VOSBURGH.

In an action brought upon an instrument in writing, where the signature of a subscribing witness to the instrument is alleged to be a forgery, the defendant cannot read in evidence the *assignment* of a lease put in evidence by the plaintiff, and purporting to be witnessed by the same person, (since deceased,) for the mere purpose of getting a signature for comparison with that alleged to be a forgery.

Where the question is upon the genuineness or the forgery of the signature of an individual as a subscribing witness to an instrument, an expert may be allowed to show the dissimilarity between such signature, and the signature of the same person as a subscribing witness to another instrument, by testifying that the one is a natural, and the other an unnatural hand; that there is a difference in the color of the ink, and the writing and slant of the letters; and that if one is genuine he should reject the other; provided such expert has been acquainted with the handwriting claimed to be a forgery, or the other instrument is *properly in evidence for other purposes*.

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THIS action was brought to recover for the value of wood and timber standing, under an instrument called a bill of sale. A verdict was rendered for the defendant, on a trial at the circuit. A case and bill of exceptions were made, and the judge ordered the exceptions to be heard, in the first instance, at the general term.

E. Countryman, for the plaintiff.

L. L. Bundy, for the defendant.

By the Court, P. POTTER, J. There is really but one material question in this case to be reviewed; to wit, whether the judge at the circuit erred in the admission of evidence, to prove the genuineness, or the forgery, of the name of one James G. Walley, which was attached to the bill of sale as a subscribing witness thereto. Walley had been dead many years. The plaintiff had produced in evidence the bill of sale in question, and had offered evidence to prove the signature of Walley, as a subscribing witness, to be genuine, and had rested his case. The defendant, after having offered some other evidence, offered to read in evidence the *assignment* of a lease, which had been put in evidence by the plaintiff; to which *assignment* the said James G. Walley appeared also as a witness. The plaintiff's counsel objected thereto, on the ground that it was *immaterial*, and that it was not offered for any other purpose than to prove a basis for a comparison of signatures of James G. Walley; and for that purpose it was inadmissible and incompetent. The court overruled the objection, and received the evidence, and the plaintiff duly excepted.

No claim was made by the defendant, that this assignment was introduced for any other purpose than that expressed in the plaintiff's objection, and the case does not show its materiality for the defendant, in any other sense

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than that expressed by the plaintiff's objection; and we must therefore assume that the judge ruled upon that assumption. The judge's subsequent rulings show that his decision was made on this assumed ground. An expert by the name of Smith was subsequently called, who, after having given his opinion as to the character of the signature claimed to be a forgery; whether it was a natural signature or otherwise; whether the letters had been changed from the original shape; and whether any of the letters had been written over; all under objection and exception; was asked to look at the said assignment, and the signature of the said James G. Walley as a witness thereto. The plaintiff's counsel duly objected to this, on the ground that it was a paper read in evidence merely for the purpose of comparison of signatures. The court overruled the objection, and the plaintiff excepted. The court allowed (under objection and exception) the witness to show the dissimilarity of the two signatures, that the one was a natural, and the other an unnatural hand; the difference in the color of the ink; the writing, and slant of the letters, and to say that if one was genuine he should reject the other. It was conceded, and the objection stated the fact, that the witness never had any knowledge of the handwriting, about which he was testifying. These same questions, objections, rulings and exceptions were repeated to three other witnesses, Lee, Scott and Avery, as experts.

The verdict of the jury, in this case, upon conflicting evidence, would seem to establish that the signature to the bill of sale was a forgery. The questions put to the experts, which were objected to, would, I think, all be brought within the rules laid down in *Van Wyck v. McIntosh*, (14 N. Y. 439;) *Dubois v. Baker*, (30 *id.* 355 to 366;) *Johnson v. Hicks*, (1 *Lansing*, 150, 162;) *Ellis v. The People*, (21 *How.* 356;) and in the MS. opinion of MILLER, P. J., in this same action, if those witnesses had been acquainted

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with the handwriting claimed to be a forgery. Or, if the assignment in question *had been properly in evidence for other purposes*. But I am inclined to think that the introduction of this assignment for the mere object of getting a signature for comparison, (a fact not at all controverted,) is, upon the authority of all the cases above cited, error. Upon this ground, I think a new trial should be ordered, costs to abide the event.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, May 7, 1872. *Miller, P. Potter and Parker, Justices.*]

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IN THE MATTER of the probate of a paper writing propounded as the last will and testament of CHARLES FOX, deceased.

A will contained a devise of the residue of the testator's estate, real and personal, to the Government of the United States, at Washington, "for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States."

Held, 1. That under this will, the United States Government could not take the real estate so devised.

2. That if the devise was to be considered as a *trust* in the United States, to apply the property devised, for the specified purpose of assisting to pay the debt contracted by the war, such a trust was not only invalid, but there was no competent trustee to take.

3. That the land being in this State, the validity of the trust was to be decided according to the laws of this State.

4. That the doctrine of equitable conversion could not be applied to the case, so as to make it the duty of the executors to sell the real estate and convert it into personalty, for the purpose of carrying out the intent of the testator. Neither by the common law, nor under our statutes regulating devises, can a devise of lands to the United States be held valid.

That government is neither a person capable of taking by devise, nor can the statute regulating devises be construed as extending this right to bodies politic or corporate, except when authorized by the laws of the State to take by devise.

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By the common law, a devise of real estate was not permitted, except for a particular use. The right to devise real estate rests in the statute. The statute of New York only allows devises to be made to persons capable of holding, and to corporations authorized by their charter to take by devise. The United States, not being within either of these descriptions, cannot take, under our statute.

To constitute an equitable conversion of real into personal estate, it must be made the duty of, and obligatory upon, the trustees, to sell in any event. A mere discretionary power of selling produces no such result.

The doctrine of equitable conversion is based upon the principle that equity will require a thing to be done that ought to be done; but when it is apparent that the thing sought to be obtained was contrary to law, there is no ground upon which the doctrine can be made applicable.

APPEAL from a decision of the surrogate of the county of New York, refusing to admit a will to probate, as a will of real estate, on the grounds that the will pro-pounded was void as a will of real estate; and that there was a want of capacity in the devisee to take.

By the Court, INGRAHAM, P. J. Application was made to the surrogate to admit the will of Charles Fox to probate, as a will of real estate.

The will contained a devise of the residue of the testator's estate, real and personal, to the Government of the United States, at Washington, District of Columbia, "for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States."

The heirs at law contested the validity of this disposition of his property. The surrogate admitted the will to probate as a will of personal estate, but refused to admit it as a will of real estate, for the reason that the will was void as a devise of real estate, and that the United States could not lawfully take, receive or hold as devisee, in trust or otherwise, under the said will, the real estate devised thereby.

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From this decision the United States appeal to this court.

Two questions have been argued before us on this appeal:

1. Whether the United States can take under this will the real estate so devised.

2. Whether, if they cannot take real estate as devisee, the doctrine of equitable conversion should not be applied so as to require the executors to convert the real estate into personalty, for the purpose of carrying into effect the intentions of the testator.

Although there are other questions which we think might have been argued in this case, we do not purpose, in the disposition of it, to notice any except those which have been urged by the appellant, as grounds for reversal of the surrogate's decree.

If this devise is to be considered as a trust in the United States to apply the property devised for the specified purpose of assisting to pay the debt contracted by the war, it is clear, under the decisions of our courts, that no such trust is valid.

The land being in this State, the validity of the trust is to be decided according to the laws of this State, (*Levy v. Levy*, 33 N. Y. 97, 136;) and as was decided in that case, the trust was not only invalid, but there was no competent trustee to take. In this case the court below held that the devise to the United States was valid. This was reversed in the Court of Appeals, and the trust in them was held to be void.

Can the United States take as devisee of real estate to their own use?

We are of the opinion that neither by the common law, nor under our statutes regulating devises, can a devise to the United States be held valid. That government is neither a person capable of taking by devise, nor can the

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statute regulating devises be construed as extending this right to bodies politic or corporate, except when authorized by the laws of this State to take by devise. This question arose incidentally in *Burrill, ex'r, v. Boardman and others*, in this court; and the right to take by devise was denied, and in that case, on appeal, (43 N. Y. 254,) the chief justice expressed his doubts as to the power to take, but the same not being necessary to the decision of that case, no definite opinion was expressed thereon.

By the common law, a devise of real estate was not permitted except for a particular use. The right to devise real estate rests in the statute. The statute of this State only allows devises to persons capable of holding, and corporations authorized by their charter to take by devise. As the appellants are not within either of these descriptions, they cannot take under our statute.

The remaining question is, whether the doctrine of equitable conversion can be applied to this case, so as to make it the duty of the executors to sell the real estate and convert it into personalty, for the purpose of carrying out the intent of the testator. In the case of *White v. Howard*, (46 N. Y. 144,) referred to in 4 *Lans.* 442, Judge Grover says: "To constitute an equitable conversion of real into personal, it must be made the duty of, and obligatory upon, the trustees to sell in any event. A mere discretionary power of selling produces no such result."

Here there is not even a power of sale; and there is no case where this doctrine has ever been extended so as to give to executors power to sell, when such power is not conferred by the will. Where the purpose for which a sale is asked for has failed, and the necessity ceased, there can be no authority for such conversion.

The doctrine of equitable conversion is based upon the principle that equity will require a thing to be done that ought to be done; but where it is apparent that the thing

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sought to be obtained was contrary to law, there is no ground upon which that doctrine can be made applicable.

Decree reversed, so far as relates to the real estate.

[FIRST DEPARTMENT, GENERAL TERM, at New York, June 8, 1872. *Ingram, Leonard and Gilbert*, Justices.]

IN THE MATTER OF THE PETITION OF SARAH E. BASSFORD and another, to vacate an assessment for paving Avenue B with Trapblock Pavement, from Houston street to 14th street, in the city of New York.

IN THE MATTER OF THE PETITION OF JOHN McARTHUR, to vacate an assessment for paving 78th street, &c.

IN THE MATTER OF THE PETITION OF HENRY VOLKENING, to vacate an assessment for paving 64th street, &c.

The statute in relation to assessments for paving streets in the city of New York only requires the resolution of the common council, authorizing such an assessment, to be published once prior to its passage in each board; and that the resolution shall not be passed until at least two days after such publication.

Where the board of aldermen received a communication from the Croton board pointing out defects in a resolution for paving, which the board had adopted; to which communication was appended an amended resolution proposed for adoption in the place of the former resolution; and the same were published by the board, in the usual manner; *Held* that the object of the law being to provide for notice to persons interested, that such a proposition was before the board, that object was as fully attained by publishing the resolution as recommended by the Croton board, as it would have been if offered by a member of the board of aldermen.

A PPEALS from orders made at a special term vacating assessments, upon applications under chapter 338 of the laws of 1858.

The facts in the several cases, and the points raised therein, being similar, it is only necessary to state those in the first—upon the petition of Bassford and Harrigan.

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The application in that case was by petition, which alleged that at the date of the confirmation of the assessment therein mentioned, viz., on the 7th of November, 1871, the petitioners were and still are the owners of the lots hereinafter described. That on that day the said assessment was confirmed by the board of revision and correction of assessments, and an assessment was thereby imposed upon lots known and distinguished therein by the ward numbers, 2810, 2811, 2813, 2810B and 2810C, and that said assessment now constitutes a lien upon said lots, having been duly entered, with date of entry, and date of confirmation, in the record of titles of assessments confirmed, kept in the offices of the street commissioner and clerk of arrears. The petitioners further alleged that said assessment was irregular and void, for the following reasons :

1. That it had never been confirmed by the common council of the city of New York.

2. Because the resolution and ordinance, authorizing the work, and in pursuance of which the work was done, and said assessment laid, were not, nor was either of them, published, as required by the seventh and thirty-seventh sections of the amended charter of 1857, nor was the report of the committee, recommending the improvement, authorized by the passage of said resolution so published.

Wherefore, the petitioners prayed that said assessment might be vacated, and the lien or liens created thereby, or by any subsequent proceeding, canceled and discharged, so far as the same affect said lots, and that the commissioner of public works, collector of assessments, comptroller of the city of New York and clerk of arrears, be each directed to cancel and discharge said assessment and said lien or liens upon the records of their respective offices, so far as the same affect the lots aforesaid.

In support of said petition the petitioners proved before the special term, that on the 7th of November, 1871, they

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were the owners of the property designated in said petition, and had ever since continued to be owners in possession thereof. The petitioners then produced in evidence the assessment list of said improvement, whereby it appeared that said assessment was confirmed by the board of revision and correction of assessments on the 7th day of November, 1870, and afterward duly entered in the record of assessments confirmed. That an assessment was thereby imposed upon said lots and against the petitioners as owners thereof, for a portion of the expense of said improvement. The petitioners then introduced in evidence the proceedings of the common council, relative to such improvement, as follows: The minutes of the board of aldermen showed that on the 15th of February, 1868, the following resolution was introduced by Alderman Repper:

“Resolved, That Avenue B, from Houston to Fourteenth street, be paved with Belgian pavement, (except that portion of said avenue included within the railroad tracks,) and that crosswalks be laid or relaid, under the direction of the Croton Aqueduct Department; and that the accompanying ordinance therefor be adopted.”

Which was laid over. On the 18th of February, 1868, Alderman Repper called up the resolution, and the same was adopted by a vote of three-fourths of the members. And the same was directed to be sent to the board of councilmen for concurrence.

On the 19th of November, 1868, the following communication was received from the Croton Aqueduct Department in relation to the laying of crosswalks in streets to be paved with Belgian pavement:

“CROTON AQUEDUCT DEPARTMENT, }
New York, November 14th, 1868. }

To the honorable the common council of the city of New York:—Gentlemen: The Croton aqueduct board respectfully acknowledge the receipt from your honorable

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body of certain ordinances for the construction of Belgian or stone block pavements, in which no provision is made for the laying or relaying of the crosswalks in connection therewith.

It is, in the opinion of the counsel to the corporation, imperatively necessary to embody in the ordinances, authority to do all the work which may be required in the matter of the crosswalks, to obviate questions as to the validity of assessments to be laid therefor.

For this reason this board respectfully recommends that the ordinances be severally amended, by inserting a provision for the laying and relaying of the crosswalks in connection with the proposed new pavements, a resolution for this purpose being herewith respectfully submitted for your consideration.

Very respectfully, your obedient servants,

THOS. STEPHENS,
ROB'T L. DARRAGH,
GEORGE S. GREENE,

Croton Aqueduct Board."

At the foot of which was the following resolution :

"Resolved, That the ordinance heretofore passed by the common council for the construction of Belgian or trap block pavement in the following localities : * *

* * * * * * Avenue B,
from Houston to Fourteenth street, be, and they are hereby severally and respectively amended, by inserting therein the words following, to wit: 'And that at the several intersecting streets and avenues, crosswalks be laid where not now laid, and relaid where those now laid are, in the opinion of the Croton board, not in good repair, or not upon a grade adapted to the grade of the proposed new pavement,' and said several ordinances, as thus amended, be, and they are hereby respectively re-adopted."

Which was laid over. On the 3d of December, 1868, the above communication from the Croton Aqueduct De-

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partment, with the resolution appended, was adopted by a vote of three-fourths of all the members elected, in favor thereof, and the same was ordered to be sent to the board of councilmen for concurrence. On the 29th of December, 1869, the resolution of the board of aldermen was adopted by the board of councilmen, by a three-fourths vote; and the same was directed to be sent to his honor the mayor for approval.

The petitioners then read in evidence the letter of the comptroller, dated July 6, 1867, designating, amongst other papers, the New York Leader, to publish proceedings of the common council pursuant to chapter 586, laws of 1867, and the letter signed by the mayor and comptroller, dated December 1, 1868, designating the same paper to make such publication pursuant to chapter 853, laws of 1868. The petitioners then proved that the following publication had been made in said newspaper in relation to said work, viz: 1st. In the issue of October 17, 1868, was published the proceedings of the board of councilmen of October 8, 1868, reciting resolution in full, and that the same was laid over. 2d. In the newspaper published November 21, 1868, was published the proceedings of the board of councilmen of November 9, reciting the resolution in full, and that the same was adopted, with the names of the persons voting in favor of and against the same. 3d. In the newspaper of November 28 was published the proceedings of the board of aldermen of November 19, reciting the reception of communication from the Croton Aqueduct Department, with proposed amended resolution, and that the same was laid over; said communication and resolution being published in full. 4th. In said newspaper, on December 12, 1868, was published the proceedings of the board of aldermen of December 3d, reciting said amended resolution in full, and that the same was adopted, with the vote thereon, and the names of persons voting for and against the same. 5th. In said news-

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paper of December 19, 1868, the proceedings of the board of councilmen of December 7 were published, reciting the amended resolution in full, and that the same was laid over. 6th. In said newspaper of December 19, the proceedings of said board of councilmen of December 10 were published, reciting said amended resolution in full, and that the same was laid over. 7th. In said newspaper of December 26, 1868, is published the proceedings of the board of aldermen of December 12, 1868, showing the reception of the amended resolution from the board of councilmen.

Upon the foregoing proof, on motion of the petitioners, an order was made by the special term, Hon. A. CARDOZO, J., on the 30th of December, 1871, vacating said assessment so far as the same affects the property of said petitioners.

From the order so entered, the mayor &c. appealed to this court.

Richard O'Gorman, for the appellants.

Charles E. Miller, for the respondents.

By the Court, INGRAHAM, P. J. In the case of *Douglass*, it was held, in this court, that one publication, two days before the passage of the resolution, was sufficient. That case, I understand, was reversed on the ground that there was no sufficient publication before the passage of the resolution in each board. I am still of the opinion that the statute only requires the notice to be published once; and that the resolution shall not be passed until two days after such notice. The statute says the resolution &c. shall not be passed or adopted until after such notice has been published at least two days. Judge Andrews, in the case of *Douglass*, says: "The design was to apprise the tax-payers, in the manner pointed out in the statute, of

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any contemplated improvement, that by remonstrance or suggestion the same might be modified or prevented."

It is reasonable to suppose that such notice would be more available by waiting two days after its publication, than by requiring two publications within twenty-four hours previous to the time of acting. There was nothing in the *Douglass* case that decided this question, and I see no reason for changing the views expressed on this point.

All laws requiring a party to have a given number of days' notice, have been construed to mean one notice served so many days before the act can be done. Thus, the notice of time to plead used to be a notice of twenty days. Notice of trial is a notice of fourteen days; and so in regard to all other notices served on the opposite party.

The notice of sale by sheriffs, and other notices to be published, are generally directed to be published once a week, or oftener by special direction.

In addition to what has been said as to all the above entitled cases, we think that the publication of the resolution as sent to the board of aldermen, in the communication of the Croton board, in the *Matter of Bassford*, was a sufficient compliance with the statute.

The object of the law was to provide notice, to persons interested, that such a proposition was pending before the board. That object was as fully attained by publishing the resolution as recommended by the Croton board, as it would have been if offered by a member of the board of aldermen. Either would give notice of the pendency of the resolution before the board; and that is all that the law requires.

I think these orders should be reversed.

Orders reversed.

DELAMATER vs. BUSH.

While in deeds, and other instruments, a party may, for certain purposes, prove the consideration to have been different from that expressed, such evidence is not admissible to contradict an *agreement* or *covenant* to pay a certain sum. The principle that previous oral negotiations are merged in the writing, is also a reason why such proof should not be admitted; in the absence of fraud or mistake.

Where, in an action upon a written agreement, the oral evidence disclosed that the parties to the action, between themselves, fixed \$450 as the sum to be paid by the defendant as rent for a stone quarry, untruly, for the purpose of obtaining from another person a portion of that sum; when, as between themselves, \$250 was all that was to be paid by the defendant; *Held* that if this was true, it was a fraud, which a party was not allowed to set up as a defense.

A PPEAL by the plaintiff from a judgment entered at a special term, on the verdict of a jury.

The action was upon an article of agreement containing a *covenant* to pay \$450 rent, for a stone quarry. The balance claimed to be due was \$200. On the trial, the jury found a verdict for the defendant.

By the Court, P. POTTER, J. 1. Evidence was admitted, against objection and exception, that the sum to be paid was \$250, and not \$450, as mentioned in the agreement. I think this was error.

While in deeds, and other instruments, you may, for certain purposes, prove the consideration to be different from that expressed, it is not admissible to contradict an agreement or covenant to pay a certain sum. The case was tried upon this theory, and by it a verdict given for the defendant.

So, too, that previous oral negotiations are merged in the writing, is a reason why such proof should not be admitted; in the absence of fraud or mistake.

2. The oral evidence disclosed that the parties to the action, between themselves, fixed \$450 as the sum to be paid, untruly, for the purpose of obtaining from another

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person a portion of that sum, when, as between themselves, \$250 was all that was to be paid by the defendant. If this was true, it was a fraud, which a party is not allowed to set up in defense.

The judgment should be set aside, and a new trial ordered; costs to abide the event.

[THIRD DEPARTMENT, GENERAL TERM, at Schenectady, June 4, 1872. *Miller, P. Potter and Parker, Justices.*]

ALLEN PAYNE vs. WILLIAM P. SHELDON, impleaded with
Thomas M. Terry, and others.

Where the property of a judgment debtor, sought to be reached and applied upon the judgment, is real estate, only, and the debtor has no other property out of which the judgment can be satisfied, and that has been conveyed to another, in fraud of the judgment, it is not essential to relief for the judgment creditor to show that execution has been issued upon his judgment.

Thus, where it was alleged in the complaint, and admitted by the demurrer, that a just debt was due from a defendant; that after the same was created, and before judgment thereon, he sold and conveyed the premises sought to be reached to one of his co-defendants, with the fraudulent intent and design of cheating and delaying the judgment creditor in the collection of his debt; that he was without pecuniary responsibility, and owned no other property out of which the judgment, or any part thereof, could be collected; *Held* that a court of equity had power to grant the appropriate relief to the plaintiff by declaring the fraudulent conveyance void, and setting it aside, and decreeing that the judgment debtor was the owner of the premises conveyed by it, and that the same were subject to the lien of the judgment. And that it was no objection to the granting of such relief, that the plaintiff did not allege, in his complaint, that an execution had been issued upon the judgment, and placed in the hands of the sheriff.

Courts of equity acquire jurisdiction to aid legal remedies, when it appears that without such assistance the legal process is ineffectual, and that with such assistance beneficial relief can be rendered.

If the property sought to be reached by a judgment creditor is liable to sale on execution, then it must be made to appear that it has been made subject to the lien of the judgment, and that there is some necessity for asking the aid of a court of equity.

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So far as real estate is concerned, the lien is effected by docketing the judgment in the county where the lands are situated; and as to goods and chattels, by issuing execution to the sheriff of the county where the property is situated, and levying on the same. The lien being thus placed upon the property, the creditor is in a situation to ask relief in a court of equity, if there be an existing necessity.

The lien of a judgment on the land of the judgment debtor, and the right to sell it on execution in payment of the judgment, is the basis of the right to have a fraudulent sale or incumbrance removed. And the fact that the debtor has no other property proves, conclusively, that there is a necessity for relief. The issuing of an execution, in such a case, does not change the situation, in the least, or benefit either party. And a return of *nulla bona* is only evidence of the necessity of securing aid from a court having equity powers.

Where a complaint does not allege that an execution, issued upon a judgment, was directed to the sheriff of the county where the judgment debtor then resided, the complaint is not aided by an averment that such execution was returned *nulla bona*.

DEMURRER by the defendant, Wm. P. Sheldon, to the plaintiff's complaint. The same was sustained at special term, and from the order there made, the plaintiff appealed.

The case, as presented by the plaintiff's complaint, is fully stated in the opinion of the court.

John Ganson, for the plaintiff.

E. W. Gardner, for the defendant.

By the Court, BARKER J. It is alleged in the complaint, that in November, 1856, the plaintiff recovered a judgment in this court, against the defendant Sheldon, for \$740, and the judgment roll was filed and judgment docketed in Ontario county clerk's office. There is no allegation that execution was ever issued on this judgment.

The complaint also alleges, that in February, 1860, another judgment, in this court, was rendered against the defendant Sheldon, in favor of the plaintiff, for \$234, and the judgment roll filed and judgment docketed in the

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same clerk's office. That an execution was issued on this judgment, directed to the clerk of Ontario county, against the property of the defendant, which was returned unsatisfied. That both of said judgments remain in full force, wholly unsatisfied. That the defendant William P. Sheldon was the owner of a certain piece and parcel of land situated in Ontario county, and after creating the debt upon which the said judgments were rendered, and before the same were entered, he sold and conveyed the land to the defendant Thomas M. Terry, who is now in the possession of the same. The complaint contains averments, alleging such conveyance to be fraudulent and void as against the plaintiff and others, creditors of said Sheldon.

The complaint then alleges, "that the defendant William P. Sheldon is a man of no responsibility, and is possessed of no other property out of which this plaintiff's judgments, and the judgments of his other creditors, can be satisfied."

The relief asked is, that the said conveyance be declared void and set aside; that it be decreed, that the defendant Sheldon is the owner, and the same is subject to the lien of the said judgments; and for other and further, proper and appropriate relief.

The learned judge, at special term, held that the complaint did not allege a cause of action, and sustained the demurrer; holding as it was not alleged, specifically, that the defendant in the judgments was a resident of Ontario county when the execution was issued on the last described judgment, the action could not be sustained on that judgment, and as it did not appear that an execution had been issued on the first described judgment, neither could the relief sought be obtained on that judgment.

The first question to be considered and determined is, was it necessary for the plaintiff to issue executions on his judgments, before he could apply to this court for the relief demanded in the complaint.

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Courts of equity acquire jurisdiction, to aid legal remedies, when it appears that without such assistance the legal process is ineffectual, and that with such assistance beneficial relief can be rendered.

But they have no jurisdiction to enforce the payment of debts. Creditors must resort to the common law courts, for process and judgment. By these means the property of the defaulting debtor is reached and appropriated to the payment of his debts. All that equity is capable of doing, is to aid in the enforcement of the judgment there obtained.

These applications are made under many and various circumstances; and it is believed that the conditions imposed by the equity courts, before assuming jurisdiction and rendering assistance, are well settled upon principle and the authority of adjudicated cases. It will be seen, upon an investigation, that the question comes to be, what kind of evidence is required, to establish the necessity for interference by courts of equity. In all cases it must appear, that there is a judgment against the debtor. The debtor's assets applicable to payment of his debts, are divided into two classes; one, when the property is made subject to a lien by the judgment and is liable to seizure and sale by process of execution, and consists of real estate and personal property; the other consists of choses in action, not liable to levy and sale on execution.

If the judgment creditor seeks to obtain satisfaction out of the class of property beyond the reach of execution, it must appear that he has exhausted his remedy at law; and the only evidence of that fact, that will be received by the rules of law, is the issuing and return *nulla bona*, upon an execution against the property of the judgment debtor, liable to sale on execution. The statute providing for the filing and prosecution of a judgment creditor's bill, so called, requires this; and whether it was the rule before this statute, it is wholly unnecessary to inquire. (2 R. S. 173, §§ 38, 39.)

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If the property sought to be reached is liable to sale on execution, then it must appear that it has been made subject to the lien of the judgment, and that there is some necessity for asking the aid of the peculiar powers of a court of equity. So far as real estate is concerned, the lien is effected by docketing the judgment in the county where the lands are situated; as to goods and chattels, by issuing execution to the sheriff of the county where the property is situated, and levying on the same. The lien being thus placed upon the property, the creditor is in a situation to ask relief, if there be an existing necessity. To show that, it must appear that the particular property sought to be reached and sold, is necessary for the satisfaction of the judgment; for if there be sufficient other property liable to sale, and there be no impediment to a fair sale of the same, then there is no necessity for applying for aid; so it must be alleged in the pleading, and if denied, proved on the trial, that there is not sufficient other property liable to sale on execution, out of which to satisfy the judgment. To illustrate; take the very common case, where the creditor has issued an execution on his judgment, to the county where his judgment is docketed, and levied upon personal property, and the debtor has real estate also in the same county, and both the real and personal property has been sold or incumbered, fraudulently, with a view to prevent and defeat a sale of the same by the judgment creditor on his execution, he can file his bill to set aside the sale or remove the incumbrances, that there may be a fair sale, and the property bring its full value. But it must appear that there is no other property of the debtor, out of which the judgment can be paid. In such a case, it is sufficient to make the averment in the complaint, and prove the same on the trial. It is a proceeding in equity, to aid the common law process; and it is not necessary to have execution returned unsatisfied.

Upon this point there is no disagreement between the

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counsel, nor dispute in the authorities. The precise question arising on this demurrer is, must there be execution, where the property sought is real estate only, and the debtor has no other property out of which the judgment can be satisfied, and that has been conveyed to another in fraud of the judgment. I am of the very decided opinion, that it is not essential to relief that execution be issued. The lien on the land, and the right to sell it on execution in payment of the judgment, is the basis of the right to have the fraudulent sale or incumbrance removed; the fact that the debtor has no other property, proves conclusively that there is a necessity for relief. The issuing of execution does not change the situation in the least, or benefit either party. If an execution, in such case, be issued and returned *nulla bona*, then it is admitted that the court may do all that is asked for in this case—set aside the fraudulent transaction; and the impediment being removed, another execution may issue, and the property be sold thereon. The fact that the return, *nulla bona*, may entitle the creditor to initiate proceedings in the nature of a creditor's bill, and have a receiver and sale by him, does not change the position any; for he may, if he so elects, pursue his remedy by process of execution, and sell the property thereon, after the debtor's title is established by a removal of the fraudulent conveyance. Thus it is proved, that the return *nulla bona*, is only evidence of the necessity of securing aid from a court with equity powers.

The only authorities, that I have been able to find, holding that it is necessary to have execution, before a court of equity will interfere, in a case like the one stated in the plaintiff's complaint, are *North American Ins. Co. v. Graham*, (5 Sandf. 197;) and *Oullock v. Colby*, (5 Bosw. 477.) The position there maintained, is in opposition to the previous practice of the equity courts of the State, and in hostility to the views of the great chancellors, Kent and Walworth. (*Brinkerhoff v. Brown*, 4 John. Ch. 671.

McElwain v. Willis, 9 *Wend.* 548. *Clarkson v. DePeyster*, 3 *Paige*, 320. *Beck v. Burdett*, 1 *id.* 308. *Mohawk Bank v. Atwater*, 2 *id.* 54. *Shaw v. Dwight*, 27 *N. Y.* 244. *Wilson v. Forsyth*, 24 *Barb.* 105. *Crippen v. Hudson*, 13 *N. Y.* 161. *Chautauqua County Bank v. White*, 6 *id.* 236.) The cases in the Superior Court, above cited, are well decided, for it did not appear in either case that the debtor had no other property out of which the judgments could be satisfied.

The case of *Shaw v. Dwight*, (*supra*), affirms all the propositions that are fundamental in the position I have assumed, in upholding the complaint as sufficient. In that case, a judgment creditor filed a bill to set aside prior judgments, on the ground that they were paid. An execution had been issued and returned *nulla bona*, but no execution had ever been issued to the county where the lands were situated. No receiver was asked for in the complaint, and by the decree the only relief granted was ordering the prior judgments to be satisfied. The defendant claimed it was essential that execution be issued to the county where the lands were located, and that the same be in the sheriff's hands, ready to sell the lands, after the prior judgments were declared paid; and one of the judges, in a dissenting opinion, held to the same view.

Judge Denio, who wrote the prevailing opinion, says, that it is no objection that the plaintiff had only a general lien by judgment. He also cites *Brinkerhoff v. Brown*, with approval, and quotes these remarks of Chancellor Kent: "If the plaintiff seeks aid as to real estate, he must show a *judgment*, creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an *execution*, giving him a legal preference or lien upon the chattels;" and then adds, the position is supported by a careful examination of the cases, and refers to the cases containing the like opinion of Chancellor Walworth.

In the subsequent part of the opinion, the learned judge

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does say: "That when it is sought to subject land by removing an obstruction to the plaintiff's execution, I am of the opinion that a *fiery facias* should be returned unsatisfied, for the purpose of showing that the plaintiff is under the necessity of asking the aid of the court, on account of his inability to collect his debt by process against the debtor's goods and chattels, but not for the purpose of perfecting his lien upon the land, for that is bound as strongly as it can be by the docketing of the judgment." The remark here made, that it is necessary to have execution returned *nulla bona*, as evidence of the necessity of asking for the aid of the court, must be considered as inconsiderately made by the learned chief justice; as it is counter to the very cases he had just cited, and repudiates the principle that a court of equity has power to aid the enforcement of an execution in the hands of the sheriff.

The defendant, by his demurrer, admits that a just debt has long remained unpaid; that after the same was created, and before judgment thereon, he sold and conveyed the premises sought to be reached to one of his co-defendants, with the fraudulent intent and design of cheating and delaying the plaintiff in the collection of his debt, that he is without pecuniary responsibility, and owns no other property out of which the judgments, or any part of the same, can be collected. The only objection he interposes against the relief prayed for is, that no execution has been placed in the hands of the sheriff. I am of the opinion that the objection is not sustained by reason or adjudication; and by the settled practice, courts of equity can take jurisdiction, in a case like this, and grant the appropriate relief. As the complaint does not allege that the execution, issued on one of the judgments, was to the sheriff of the county where the judgment debtor then resided, the complaint is not aided by the averment that the same was returned *nulla bona*. (*Read v. Wheaton*, 7

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Paige, 664. *Smith v. Fitch*, 1 *Clarke's Ch. R.* 265. *Wilbur v. Collier*, *Id.* 315.)

The order appealed from is reversed, and, the demurrer overruled; with leave to the defendant Sheldon to answer on payment of costs.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Johnson, Talcott and Barker*, Justices.]

MARGARET H. GILLIS vs. EDWARD H. SPACE, sole Trustee of School District No. 4, in the town of Salamanca.

A contract, made by the sole trustee of a school district, with an individual to teach in a common school in said district, for a period extending beyond the trustee's term of office, is valid, and binding upon his successor in office.

The law imposes upon a party subject to injury from a breach of contract by another, the active duty of making reasonable exertions to render the injury as light as possible. And if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him.

Where a contract was made, by the trustee of a school district, with the plaintiff, by which the latter was engaged to teach in the principal department of a common school in said district, for the term of one year, and such contract was broken by the trustee, by his refusal to permit the plaintiff to enter upon or perform her duties as teacher; it was *held* that the violation of the contract, by such trustee, and the plaintiff's offer specifically to perform, *prima facie* entitled the latter to recover the contract price, and cast upon the defendant the burden of proving that by reasonable exertion the plaintiff could have obtained other like employment in the vicinity of the place where the contract entered into was to be performed.

Held, also, that it was the duty of the plaintiff to make a reasonable exertion to secure another school, and not remain idle for a whole year, awaiting a call from other districts. But that, to make a case for mitigating damages, the defendant was required to prove that, by making such efforts, employment could have been secured, by the plaintiff.

In an action upon such a contract, brought to recover the wages therein agreed to be paid to the plaintiff, the defendant proved that, in general, the schools in the town and neighborhood were not taken, on the day when the defendant refused to allow the plaintiff to enter upon her employment; also

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the compensation which was usually paid for teaching the common schools in the several districts of said town; and asked the court to submit to the jury, as a question of fact, in mitigation of damages, whether the plaintiff could not have obtained, by the use of due diligence, other employment of the same general nature, and in the same vicinity. *Held* that the court properly refused to submit the question to the jury, upon that evidence.

Held, also, that in such action, the defendant should have been allowed to prove, in justification of his official act, and in bar of a recovery, that the plaintiff was incompetent to teach the school; notwithstanding she had procured from the proper district school commissioner a certificate of her qualifications to teach.

Such a certificate is not *conclusive* evidence of qualification, when that question arises between trustees and teacher. It is *prima facie* evidence, only; and the presumption raised by it may be rebutted by direct evidence tending to show that the holder lacks all or any of the requisite qualifications.

The trustee of a school district has no power to contract for the services of an unlicensed teacher, and bind the district. But if he should make it a condition of hiring that the teacher should procure a certificate before entering upon the duties of teaching, such contract would be valid; for then the services of a licensed teacher would be bargained for. *Per* BARKER, J.

THIS is an appeal from a judgment entered on the verdict of a jury, in favor of the plaintiff. The action was tried at the Cattaraugus county circuit, before the Hon. GEO. D. LAMONT.

By the bill of exceptions, it is disclosed, that one Albert Hosley was sole trustee of the said school district, and that his term of office expired on the 11th day of October, 1870, and on that day the defendant was elected his successor in office, and has held the office ever since. That on the 29th day of September, 1870, the said Hosley, as such trustee, entered into a written agreement with the plaintiff, whereby she was engaged to teach the principal department of the school in such district, for the term of one year, commencing on the 17th day of October then following. That at the time of entering into said written agreement the plaintiff had no license as a teacher, as required by the statute regulating the granting of licenses to teachers; and that the said Hosley was so advised. And it was agreed between the plaintiff and Hosley that

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she should procure a certificate before the commencement of the school. It does not appear whether this condition was embraced in the written contract or not. That on the 12th of October, 1870, the plaintiff procured, from the district commissioner, the usual and customary certificate of qualifications of the second grade.

On the 17th of October, 1870, the plaintiff presented herself at the school-house door, and offered to the defendant to enter upon her said contract to teach such school, and the defendant refused to permit her to teach said school, and gave her a written notice of such refusal, on the same day, stating in such notice his grounds of refusal, in these words: "I do not recognize your contract with Mr. Hosley as valid against the district." The plaintiff gave notice of her readiness to teach the school, and that she would remain in readiness to teach for a year, and did for the whole of said year hold herself in readiness to teach such school. That the said school was a common and not a graded school. For convenience it was divided into four departments, with a principal teacher and four assistants.

The plaintiff having made this proof, she rested her case. The defendant asked the court to hold and decide as matter of law, that the contract with Hosley, his predecessor in office, was void for the reason that the plaintiff was not at that time a qualified teacher, and he had no legal right to contract with her as a teacher. The court declined so to hold and decide, and the defendant excepted to such ruling.

The defendant moved for a nonsuit on the ground that Hosley had not power to make a contract of this nature, to extend beyond his term office, and the same was not binding on his successor in office. Motion denied, and the defendant excepted.

The defendant, to prove and maintain his defense, offered to prove that the plaintiff's education was inadequate to enable her to teach the first department of said

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school; the plaintiff's counsel objected to such evidence, as incompetent and immaterial, and more specifically upon the ground that while the certificate remained in full force it was *conclusive* evidence of her legal qualifications to teach, as principal, the said school. The court sustained the objection, and the defendant excepted.

The defendant then proved "that, in general, the schools in the town of Salamanca, and adjoining towns, were not taken on the 17th day of October aforesaid, and also the compensation which was usually paid for teaching said schools in the several districts aforesaid, and then rested;" and asked to submit to the jury, as a question of fact, in mitigation of the plaintiff's damages, whether the plaintiff could not have obtained, by the use of due diligence, other employment of the same general nature, and in the same vicinity. The court refused to submit the case to the jury, and the defendant excepted.

The court ordered a verdict in favor of the plaintiff for the sum of \$480, the contract price for the whole year; and the defendant excepted to such ruling.

S. S. Spring, for the appellant.

David H. Bolles, for the respondent.

By the Court, BARKER, J. The contract entered into between Hosley and the plaintiff is binding upon the defendant, as the successor of Hosley. They each represent the same principal, and the act of the former was within the power and authority vested in him, "to contract with and employ all teachers in the district school or schools." (*Laws of 1864, ch. 555, § 48, subd. 9.*) There is not any limit, in terms, placed on the exercise of this power. It is also manifest, that to limit the right to employ a teacher, for a time not beyond the incumbent's term of office, would lead, at times, to great embarrassments, and deprive

the district of the opportunity to receive the services of desirable teachers. An indiscreet or corrupt officer may impose on the district, it is true. The inhabitants of the district and patrons of the school must confide this power somewhere, and their protection is in selecting competent and honorable officers.

The precise question has been adjudicated, and decided in favor of the power being vested in the trustee. (*Silver v. Cummings*, 7 Wend. 181. *Williams v. Keech*, 4 Hill, 168.)

Upon the question of damages, as presented by the defendant, in requesting the court to submit it to the jury, whether the plaintiff could not have obtained, by the exercise of due diligence, other employment of the same general character, in the same locality, the following rule, as stated in *Hamilton v. McPherson*, (28 N. Y. 72,) is justly applicable to cases of this nature: "The law, for wise reasons, imposes upon a party subject to injury from a breach of contract, *the active duty of making reasonable exertions* to render the injury as light as possible." "Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him." The duty thus imposed on a party subjected to a loss, by the default of another, utterly repudiates and condemns the fallacious proposition, argued by the learned counsel for the plaintiff, that the plaintiff was not required to make any effort to secure employment, as a teacher, during the year of her engagement; but was only required to accept offers to teach made by those seeking her services. The violation of the contract by the defendant, and the plaintiff's offer specifically to perform, *prima facie*, entitled the plaintiff to recover the contract price; and cast the burden of proof on the defendant, to show that, by reasonable exertion on her part, she could have obtained other like employment, in the vicinity of the place where

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she was to perform the contract entered into. This much can be deduced from the case of *Costigan v. Mohawk and Hudson R. R. Co.*, (2 *Denio*, 609,) and nothing more, when compared with the many other previously adjudged cases, involving the same and kindred propositions. (*Costigan v. The M. and H. R. R. Co.*, *supra*. *Shannon v. Comstock*, 21 *Wend.* 457. *Heckscher v. McCrea*, 24 *id.* 304.) It was the duty of the plaintiff to have made a reasonable exertion to secure another school, and not remain idle for a whole year, with folded arms, awaiting a call from other districts. To make a case for mitigating damages, the defendant was required to prove that by making such efforts employment by the plaintiff could be secured.

In my opinion the evidence produced, by the defendant, on this point, as set forth in the bill of exceptions, was not of the character and strength, to entitle the defendant to the opinion of the jury thereon. The substance of the statement is, that some of the schools in Salamauca and adjacent towns were not taken on the day the plaintiff was to enter upon the performance of the contract in question. The number of schools in these towns, wanting teachers, is not stated; nor how long the vacancies remained; or that the plaintiff knew, or had reason to believe, that such opportunity to engage her services as teacher existed. The court may take judicial notice of the territorial extent of these towns, but beyond that, proof must be adduced, upon which to base and guide the judgment of the court and jury. In many of the avocations of life, a year's idleness would alone be sufficient evidence, that a person having control of his own time, had not used reasonable diligence to secure employment in his trade or calling. But teaching is a profession. In the country it is well known, that the winter schools are usually taken as early as the middle of October, or very soon thereafter. The summer schools are very often entirely primary, and are perhaps such as an experienced and tal-

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ented woman teacher, would not be required to accept and superintend, for the purpose of diminishing the damages of a party violating his contract.

The offer of the defendant to prove, in justification of his official act, and in bar of a recovery, that the plaintiff was incompetent to teach the school, was improperly overruled by the learned judge at the circuit. The claim made, that the certificate of qualification was conclusive in her favor, is most decidedly erroneous. If she was in fact disqualified, then she could not perform her contract and discharge the delicate and important duties she had promised. Nor was the defendant required to allow her to make the experiment and prove, publicly, her unfitness. A school teacher is, in a certain sense, a servant to the employer, and not an officer, of which the certificate granted by the commissioner is evidence of his right and qualification. The certificate is a sort of permit, that trustees of school districts may employ the holder to teach in the public schools. Without such certificate they have no right to engage a person as teacher. With a person holding such certificate, they may make a valid contract binding on the district. There is nothing in *Finch v. Cleveland* (10 Barb. 290) holding to the contrary. (*Laws of 1864, ch. 555, title 2, § 13, subd. 5.*) By the provisions of another section, (title 1, section 15,) the State superintendent may grant certificates, and it is provided that such certificate shall be conclusive evidence that the person to whom it is granted is qualified, by his moral character, learning and ability, to teach any common school in the State. No such effect is given in terms to the certificate issued by a district commissioner. It is the uniform practice of the Department of Public Instruction, to hold that the certificate is not conclusive evidence of qualification, whenever that question is up, between the trustees and the teachers. The rulings of the department are collected and published in the *Code of Public Instructions, pp. 393-403, ed.*

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of 1868. These decisions are not strictly judicial, and binding on the courts as authority, but they are the opinions of high and intelligent officials, charged with the duty of administering an important department of the government. We concur in the comments of one of those officers, that "the license which the teacher holds from the proper officer is *prima facie* evidence, only, that the applicant possesses these requisites, but it is not conclusive; the presumption raised by it may be rebutted by direct evidence, tending to show that the holder of such license lacks any or all of these qualifications."

The trustee of a school district has no power to contract for the services of an unlicensed teacher, and bind the district. If he should make it a condition of hiring, that the teacher should procure a certificate before entering upon the duties of teaching, such contract would doubtless be valid, for then the services of a licensed teacher are bargained for. (*See title 2, § 13, subds. 5, 6; title 7, art. 6, § 48, subds. 9, 10; Laws of 1864, ch. 555; Code of Public Instructions, p. 140, ed. 1868.*)

The bill of exceptions does not state whether the promise of the plaintiff to procure a certificate was a part of the written contract, or not. If it was not, the plaintiff cannot recover.

New trial granted; costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Johnson, Talcott and Barker, Justices.*]

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Where the complaint, in a justice's court, did not, in terms, charge the defendant with breaking and entering the plaintiff's close, but the facts which constituted the real cause of action were stated, and these showed that the injury was occasioned, not by breaking and entering, but by opening a sluice in a highway and turning the waters in the ditch of said highway upon the plaintiff's land to his injury; *Held* that the allegation of breaking and entering was clearly, upon the face of the complaint, mere surplusage; and that there was no error committed by the justice in so amending the complaint as to allow the true cause of action therein stated, only, to remain.

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An overseer of highways has no right, in making repairs upon a highway within his district, although in other respects suitable and proper, to change a natural watercourse, or the natural course of surface water drainage, so as to cast the water upon the lands of an owner abutting upon a highway where it had not been previously accustomed to flow; or to increase, considerably, in volume and quantity, either the water in a natural watercourse, or from surface drainage, flowing upon such land, to the injury of the owner thereof.

This results from the right of the public in a highway. It is a mere right of passage over the soil; and although the public has the right to alter, shape and fashion its roadway in such a manner as to render it convenient, safe and useful for the purposes of passage, still, adjoining and abutting lands, outside of the way, are not servient estates to this right of way, so as to authorize the public, through its officers, to change natural watercourses, or the natural course of surface waters, in regard to such lands, to the injury of the owners, with impunity. The public must construct and repair their way with reference to the rights of adjoining owners of lands.

An overseer of highways cannot, by any act of his own, either confer any new rights upon the public, or impose any new burdens upon individuals to their injury.

In the discharge of his official duty as overseer, he has the right to make such change as he may deem necessary, not only by way of repair of the road, but by way of preventing further injury, provided that, in so doing, he does not interfere with the rights of others.

He may, for this purpose, restore a highway to the condition it was in at a former period when a change was made in a ditch and sluice, and restore the public to all the rights they then had which have not become forfeited; yet if he undertakes to restore, he should restore the way, in all respects, to the condition it was in at such former period, and the public to the rights it then had.

He has no right to leave a sluice which would carry off water from the ditch to his own land, closed, and open a sluice which will carry the water that should rightfully pass to his own land, upon the lands of his neighbor.

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A PPEAL from a judgment of the county court of Onondaga county, upon a verdict of the jury, rendered on the second trial of the action. The case, as it appeared on the appeal from the judgment rendered on the first trial, is reported in 60 *Barb.* 388.

A new trial having been granted, upon the former appeal, the second trial was had, before the county judge of Onondaga county, and a jury, in October, 1871. Upon said trial a map made by John D. Borden was proved to be substantially correct, and was put in evidence. It was proven that the highway indicated on said map, as leading in a northerly and southerly direction past the respective dwelling-houses of the plaintiff and defendant, had been there for sixty years before the trial. It was also proven that, at a point indicated on said map as the school-house and the defendant's house, a highway leads east to another highway, and that the same had been there from time immemorial, and that each of said highways was open and had been used by the public for the time aforesaid. It was further proved that the land descended from the west of said first mentioned highway to the southeast, and that said road was made along the side of the hill by cutting the same out, and turnpiking it up. That in time of freshet or high water, ordinary spring or fall rains, or melting of the snow, considerable water collected and ran down on the west side of said highway, and that that which found its way down on the west side of the road, passed the school-house, crossed said road at a sluice near the plaintiff's house, and designated as the Moran sluice, and after crossing said road ran across the plaintiff's meadow, through a depression in the land, to the southeast corner thereof, and thence across the east and west road upon the defendant's land, across that, forming a regular channel or watercourse on the defendant's land; that the ground at the road at the Moran sluice was from six to ten feet higher than it was at the southeast corner

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of the plaintiff's meadow, and that the distance across the same was about forty rods. Evidence was given upon said trial tending to show the natural flow of waters, south and southwest of the school-house, was into and through the ravines indicated on said map, and on to the defendant's land, except for the highway. It was also proved that in the year 1861 the trustees of the school district in which said highways were situate, (evidence was given tending to show that the same was done under the direction and with the consent of the highway authorities of said town,) put a sluice across the north and south road, at its intersection with the east and west road, and filled up the ditch on the west side of said north and south road, in front of the school-house, and it was thereafter maintained and kept in repair by the highway authorities of said town, the effect of which was to prevent the water running down to the plaintiff's or Moran sluice and across his meadow, and to take it down the south side of the east and west road; and that the sluice so put in as aforesaid remained there until June, 1869, when the same was filled up by the defendant, and the ditch opened by him on the west side of the north and south road communicating with Moran's sluice, which the defendant then opened; the effect of which was to turn the water back from the east and west road, and cause it to flow down the west side of the north and south road, to the Moran sluice. It was also proved that water running down on the south side of the east and west road had washed the same out, for the distance of fifteen rods in length, and from four to eight feet wide, and about four feet deep, and that this cutting out came within four or five feet of the traveled part of the road; that the banks were nearly perpendicular; and that at the time the defendant filled up the sluice and turned the water to run down the west side of the north and south road, he was overseer of highways for the road district in which said highways were situate; and evidence

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was given tending to show that he did the same as such overseer, with the work of the district, but did the act complained of contrary to the advice and direction of the commissioners of highways of the town. It was further proved, that within a few days after the defendant turned the water as above stated, a severe storm of rain occurred, the effect of which was to cause the water flowing down on the west side of the north and south road, and through the Moran sluice, to overflow a portion of the plaintiff's meadow, and wash away a considerable portion of the highway adjoining the same, and to choke and fill up a number of rods of under-drains upon said meadow, and to injure several tons of grass which had been cut and was lying thereon. Evidence was given by the plaintiff tending to show that for time immemorial, prior to 1860, there had been a sluice near a butternut tree across said north and south road, about thirty-six rods south of the school-house, which carried the water collecting on the west side of that road, and running down in the ditch on that side south of the sluice across the highway, to the east side thereof, across defendant's lands, through a natural depression or ravine, marked upon said map, where it found its way to the valley below; and that in 1860 one Fellow, who was then overseer of said road district, removed an embankment placed in the ditch at that point, and which turned the water into the last mentioned sluice, the effect of which was to cause the water to flow past that sluice and down the west side of the road to Moran sluice, and thence across his meadow, and that it so run at the time the trustees put the sluice across the road in front of the school-house. Evidence was given tending to show that the butternut tree sluice was closed at the same time the one in front of the school-house was put in. It was proved that all the water on the west side of the road north of the upper sluice, and which was designated as the sluice by the butternut tree, had for time immemorial run down on

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the west side of the road, past the school-house to the Moran sluice, thence across the road and on to and across the plaintiff's meadow, but not in quantity sufficient to injure the plaintiff's land, and except on one or two occasions, when the butternut tree sluice was closed, where it run after the defendant turned it from the east and west road, down to the time when the trustees of the school district put in the sluice, as hereinbefore stated, and that more water collected south of the butternut tree sluice than north of it.

The plaintiff thereupon rested his case, and the defendant moved for a nonsuit on the ground that the complaint being in trespass, for breaking and entering the plaintiff's close, there could be no recovery, as no breaking or entering by the defendant had been shown. The plaintiff thereupon moved to amend his complaint, by making it to conform to the evidence given, to which motion the defendant objected, on the grounds: 1st. That there was no power in the court to grant the amendment. 2d. That the effect of the proposed amendment was to change the nature of the action, and substitute a new and different action from that before the justice. The objection was overruled and the amendment allowed; to which ruling and decision the defendant excepted. No amendment was in form made.

On the part of the defendant, evidence was given tending to show that the water collecting on the west side of the north and south road, from above or south of the sluice by the butternut tree, had flowed down on the west side of the road, past the school house, to the plaintiff's sluice, and thence across the highway and the meadow of the plaintiff, in the same manner as it did after the defendant turned it, as before stated, for more than twenty years before the sluice was put across the road in front of the school-house, by the trustees of the school district as aforesaid. Evidence was given tending to show that the

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washing away of the east and west road by the water current through the sluice put in by the trustees of the school district as aforesaid, increased from year to year by the action of the water aforesaid, but was capable of permanent repair as aforesaid. That in June, 1869, the defendant was overseer of the road district in which said highways were situate, and that to repair said east and west road, and to prevent its further washing away, and to protect it from the action of said water, he, as such overseer, filled up the sluice put in by said school district as aforesaid across the north and south road, and opened the ditch on the west side of that road in front of the school-house as aforesaid, the effect of which was to turn the water from running down the east and west road, and cause it to flow down the west side of the north and south road to the plaintiff's sluice, and thence across his meadow to the southeast corner thereof, and from thence across the defendant's meadow, where it had run from below the butternut tree sluice up to the time the trustees of said school district put in said sluice, as before mentioned.

Upon the close of the evidence, the court charged and instructed the jury as follows: "It appears from the evidence, that about the first of July, 1869, the defendant, being overseer of the road district, caused the sewer which carried the water across the Onondaga road at the school-house, and thence down the east and west road, to be closed, and caused the sluice in front of the school-house to be opened, thus conducting the water that found its way into the ditch on the west side of the Onondaga road, down through the sluice in front of the school-house, and thence to the Moran sluice and upon Mr. Moran's land. It appears, further, that shortly after this was done there came a rain storm, and the waters collecting in that ditch flowed down upon the plaintiff's land, in such quantity as to flood the land and do him the damage, to recover for which this action is brought. Whether the plaintiff can re-

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cover, depends upon the rightfulness of the defendant's act in turning the water from the east and west road down this ditch, at the upper side of the Onondaga road, as before stated. It appears that for more than twenty years prior to 1861, the waters finding their way into this ditch on the upper side of the Onondaga road, below the butternut tree, passed down that ditch past the school-house to Moran's sluice, thence upon the plaintiff's land. That in the fall of 1861, or spring of 1862, there was a sluice constructed across the road at the school-house, which carried all the water above that point down the ditch along the east and west road, where it had flowed ever since, until it was turned by the defendant, as before stated. Inasmuch as the waters below the sluice at the butternut tree had flowed through this ditch past the school-house, and upon the plaintiff's land, for more than twenty years prior to the time when they were turned down the east and west road by means of the sluice across the road at the school-house, in 1861, it follows that the public had thereby acquired the right thus to flow these waters by user, and therefore the defendant would not be liable in this action if he had only turned these waters, finding their way into this ditch below the butternut tree sluice, upon the plaintiff's land. But it is claimed by the defendant that the waters, finding their way into this ditch above this sluice above the butternut tree, had also been accustomed to flow down upon the plaintiff's land for more than twenty years prior to 1861. Witnesses testified that they knew the sluice in childhood, saw the water running through it, but afterwards had not noticed it passing through. On the other hand, other witnesses swear this sluice was kept in operation down to the time of the construction of the school-house sluice across the Onondaga road, and the water ran on to the east side of that road through the butternut tree sluice. That is one question for you to decide, whether those waters south of the butternut tree sluice passed down

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the west side of the Onondaga road to the Moran sluice for twenty years or upwards. If they had not, then the public had not acquired the right to divert them. As to those waters, their diversion on the plaintiff's land was wrongful. If you find that the waters above the butternut tree sluice were used to flow upon the plaintiff's land for twenty years or upwards, then that is an end of this action. If you find that the waters finding their way into the ditch above the butternut tree had not flowed there twenty years before the sluice was put in at the school-house, then the plaintiff is entitled to all the damages occasioned by them. The defendant would be liable for all the damages he has sustained, if you find that without these waters he would not have been damaged by turning the other waters."

The defendant, in due time, excepted to that part of said charge commencing with the sentence, "If you find that the waters finding their way into the ditch above the butternut tree," and ending with "would not have been damaged by turning the other waters." He also, in due time, excepted to that part of said charge which reads as follows: "That is one question for you to decide, whether these waters south of the butternut sluice passed down the west side of the Onondaga road to the Moran sluice for twenty years or upwards. If they did not, then the public had not acquired a right to divert them. And as to these waters, the diversion of them on the plaintiff's land was wrongful."

The defendant requested the court to charge the jury, "If the jury find that the water from below or north of the butternut tree sluice has flowed down the west side of the road in the ditch to Moran's sluice, and across the plaintiff's meadow in question, for more than twenty years before the sluice was put in across the north and south road, in front of the school-house, by which it was changed to flow down the east and west road, and it was turned back by the defendant, acting as overseer of the road dis-

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trict, to the place where it had formerly run, in good faith, and believing that to be the best way to repair and protect the road, then he is not liable, although more water might have come down the ditch to the plaintiff's land by reason of stopping the sluice at the butternut tree." Which request was refused by the said court, and the defendant excepted.

The jury, by their verdict, found for the plaintiff \$51 damages. The defendant moved the court, upon the minutes, for a new trial; which motion was denied. And from the judgment rendered upon the verdict, the defendant appealed to this court.

Geo. N. Kennedy, for the appellant.

Geo. B. Gillespie, for the respondent.

I. Two questions only were submitted to this court. 1st. Was there any error in allowing a proposed amendment of the complaint, not in form made? 2d. Was there error in the charge, or in refusing the request to charge?

II. Upon the first question, the 5th subdivision of section 366 of the Code, in express terms, empowers the county court to allow such amendment. 1st. But such amendment was not essential; for all forms of action were abolished, and the complaint contained all facts necessary to maintain the action. 2d. *Quare clausum fregit* was the ancient form, because our close is just as effectually broken and entered by the defendant's agent, the element of wrongful waters, as by a crowbar or pickaxe applied to our gateway. 3d. No amendment was in form made.

III. Does the office of overseer of highways confer upon the defendant, in this case, rights, powers, immunities from action, that an individual hath not? We answer not; because, 1st. The bill shows evidence, not controverted, that the defendant, as overseer, was directed by the commissioners of highways of said town not to do the act

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complained of. 2d. As matter of law, "all the powers of overseers must be taken to be subordinate to, and under the superior control of the orders of the commissioners, whom they are bound to obey." (*Bartlett v. Crozier*, 17 *John*. 447.) (a.) This case is not reversed or criticised, but followed and approved, up to the present time, by the Court of Appeals. (*See Wait's Table of Cases*, p. 37.) Hence, the exceptions referred to assumed an official capacity in the defendant to do this act, which the bill concedes did not exist officially, the act being interdicted by the defendant's superior officers. (b.) But suppose this was yet an open question, that there was conflict upon it in evidence, then the request should have been qualified by making provisions for a finding whether the act was interdicted by competent authority. Also, as to whether the act was reasonable, necessary and not an abuse of official discretion, if not interdicted by the commissioners. For a request to charge must be in such form that the court may charge in the very terms of the request, without qualification. (*Carpenter v. Stilwell*, 11 *N. Y.* 79.) (c.) The point here made, is not that the defendant, as overseer, was "not ordered," as put in this case in 60 *Barb.* 391; but that he was ordered not to do the act complained of, by the commissioners of highways. This must surely render his attempted justification abortive.

IV. As an officer, aside from the protest of the commissioners, he had no right to turn the waters above the butternut tree sluice, upon us. (*Thompson on Highways*, 152. *Cook on Highways*, 113. *Plummer v. Sturtevant*, 32 *Maine*, 325) Nor can the defendant excuse himself, by saying (as is contemplated by his request) that some other party had increased the flow before he did the act complained of. He cannot thus visit the sins of another upon this plaintiff. (*Martin v. Riddle*, 26 *Penn.* 415, note a.) (a.) A road must be worked so as not to obstruct the natural flow of water. (*The People v. Kingman*, 24 *N. Y.*

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559,) (b.) Conceding that there are many cases of constructing, grading, leveling and repairing highways by officers having lawful authority, in which an injury occurs from a reasonable exercise of such authority, which are *damnum absque injuria*; yet the courts draw between those cases and this, a sharp, well defined line of distinction; and we assert that no approved case can be found in this or in any other State, or in England, which confers upon the pettiest officer of a town immunity from action, who diverts from their ancient, natural channels either surface or living waters, which have been accustomed to flow on his own land from time immemorial, and casts them upon his neighbor's land to his damage, upon any pretext. But the converse of this has been held, in all countries, almost as long as those channels have existed.

V. The defendant as a private person has no such right. (*Foot et al. v. Bronson et al.*, 4 *Lans.* 47.) Nor to divert waters which he has a right to turn, if commingled with waters he is not entitled to divert. (*Thomas v. Kenyon*, 1 *Daly*, 132. *Bellows v. Sackett*; 15 *Barb.* 97. *Bellinger v. N. Y. C. R. R.*, 23 *N. Y.* 42. *Kauffman v. Griesmer*, 26 *Penn.* 407.) Surface water shall follow natural channels, the same as living water. (*Kauffman v. Griesmer*, *supra*. *Miller v. Laubach*, 47 *Penn.* 154.) Therefore this judgment should be affirmed, with costs.

By the Court, JOHNSON, J. There was no error in the county court in allowing the amendment, to the extent that it was allowed, as it did not change the cause of action, or alter it in any particular. True, the complaint before the justice did, in terms, charge the defendant with breaking and entering the plaintiff's close, but the facts which constituted the real cause of action were stated, and these showed that the injury was occasioned not by breaking and entering, but by opening a sluice in a highway and turning the waters in the ditch of said highway upon

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the plaintiff's land, to his injury. The allegation of breaking and entering was clearly, upon the face of the complaint, mere surplusage, and there was no error committed in so amending the complaint as to allow the true cause of action therein stated, only, to remain.

The cause of action was plainly what would have been formerly known as an action on the case, and it was tried as such, and no injury was done to the defendant by the amendment.

The question at issue, and which was tried, was, whether an overseer of highways has the right, in making repairs upon a highway within his district, in other respects suitable and proper, to change a natural watercourse, or the natural course of surface water drainage, so as to cast the water upon the lands of an owner abutting upon a highway where it had not been previously accustomed to flow; or to increase considerably in volume and quantity, either the waters in a natural watercourse, or from surface drainage, flowing upon such land, to the injury of the owner thereof. We think it clear that the overseer has no such right, and hold the law so to be. This results, we think, from the nature of the right of the public in a highway. It is a mere right of passage over the soil; and although the public has the right to alter, shape and fashion its roadway, in such a manner as to render it convenient, safe and useful for the purposes of passage, still, abutting and adjoining lands, outside of the way, are not servient estates to this right of way, so as to authorize the public, through its officers, to change natural watercourses, or the natural course of surface waters in regard to such lands, to the injury of the owners, with impunity.

The public must construct and repair their way with reference to the rights of adjoining owners of lands. The defendant, in his answer, justified the acts complained of upon the ground that he was overseer of the highway, and that such acts were necessary for the benefit of the highway.

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The road was a north and south road, and the water flowed northward through the ditch on the west side. The evidence showed, and the court held, that in 1862 the public had acquired, by user, a prescriptive right to have the water flow through this ditch from a point as far south as a certain butternut tree, and through the sluice which the defendant opened at the time in question, upon the plaintiff's meadow, where it flowed at the time complained of. In 1862 a change was made, by filling up the west ditch at a point between the sluice in question and the butternut tree, and another sluice made across the road at that point; which had the effect to turn all the water coming from the south to that point, down the south ditch of an east and west road, which there intersected the north and south road. The effect of this had been to make a deep gully on the south side of the east and west road, and to render the road unsafe and dangerous to travelers. To remedy this difficulty, and to prevent further injury to the east and west road, the defendant, as overseer, filled up the new sluice, cleaned out the west ditch on the north and south road, and restored it to the condition in which it was, at that place, prior to 1862. He also re-opened the sluice which, it seems, had in the mean time become filled up or closed, so that the water in the west ditch passed through and upon the plaintiff's land as it had prior to 1862. The court ruled and charged the jury, that if by this last change, the defendant had only restored the west ditch and the sluice there re-opened, to the same condition in which they were prior to 1862, and no water passed through and upon the plaintiff's land, except what came into the ditch between the sluice through which the water passed and the butternut tree, the defendant's acts were justifiable, and the action could not be maintained.

There was evidence in the case tending to show, that prior to the time when the new sluice was made and the water turned down the south ditch of the east and west road,

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there was a sluice just above and south of the butternut tree, across this north and south road, by means of which all the water coming through the west ditch, south of the butternut tree, was carried across the road, and down through a natural depression in the surface of the land, upon lands owned by the defendant; and that this sluice was filled up about the time the ditch was filled up at the intersection of the east and west road, and the sluice there made to carry the water into the ditch of the other road, the effect of which was to bring the water from a distance considerably farther south than the butternut tree, and increase the volume and quantity of water in the west ditch at the point of the intersection of the east and west road and at the sluice, by which the water was carried upon the plaintiff's meadow. It was claimed by the plaintiff, and the evidence on his side tended to show, that it was this increased volume and quantity of water which occasioned the injury, and that but for this increase, no injury would have happened. These facts were controverted by the defendant, who gave evidence tending to prove that, for more than twenty years prior to 1862, the water had flowed through the west ditch, the same distance, from the south, and that no change had been made within that time, by which the quantity of water flowing through that ditch had been increased. These disputed questions the court submitted to the jury, and charged that if the water from the same distance had flowed through the ditch for twenty years, the plaintiff could not recover; but if it had not, and the injury was occasioned by the increased volume of water from the longer distance, the plaintiff was entitled to recover such damages. The jury found in favor of the plaintiff. The defendant's counsel excepted to this part of the charge. The charge, we think, was clearly right. The defendant, doubtless, in the discharge of his official duty as overseer, had the right to make such change as he might, in the exercise of his judgment,

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deem necessary, not only by way of repair of the road, but by way of preventing further injury, provided that in so doing, he did not interfere with the rights of others.

He might, for this purpose, unquestionably restore the way as it was when the change was made in 1862, and the public to all the rights they then had which had not become forfeited. But if he undertook to restore, he should have restored the way in all respects to the condition it was in at and prior to 1862, and the public to the rights it then had. He had no right to leave the sluice which would carry off water from the ditch to his own land, closed, and open the sluice which would carry the water that should rightfully pass to his own land upon the lands of his neighbor. This the jury have found he has done.

The court properly refused to charge as requested by the defendant. The substance of that request was, that the defendant had the right to make the change for the benefit of the road, if he acted in good faith, even if it had the effect to throw more water upon the plaintiff's land than had ever been carried there before, or than would have gone there had the entire way been restored to its former condition. This proposition, as we have undertaken to show, cannot be maintained. It must be obvious to any one, that an overseer of highways cannot, by any act of his own, either confer any new rights upon the public, or impose any new burdens upon individuals to their injury.

The judgment, we think, is right, and should be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Johnson, Talcott and Barker, Justices.*]

CLAYTON L. HILL *vs.* PHILANDER PIXLEY, impleaded with
Milo W. Hill and others.

On the 7th of August, 1855, certain premises owned by H. became subject to the lien of a judgment on that day docketed against him. On the 24th of August, 1855, H. executed to M. a mortgage on the same premises, for \$5809, which was recorded on the 27th of the same month. On the 22d of November, 1856, the premises were sold, upon an execution issued on said judgment, and bid off by G. On the 4th of May, 1858, a deed of the premises was executed by the sheriff to E. G., the assignee of the certificate of sale. E. G., on the 1st of June, 1859, conveyed the premises to M., the mortgagee, who still remained the owner of the mortgage, never having taken any steps to effect a redemption of the premises from the sale under the prior judgment. On the 20th of May, 1860, M. deeded the premises to L. H. The mortgage was subsequently placed in the hands of A., who re-transferred it to M., and M. transferred it to the plaintiff. In proceedings by the creditors of H., against him and L. H., it was decreed that L. H. held the title in trust for H., and in fraud of creditors; and both were ordered to convey to a receiver. In an action to foreclose the mortgage, the defendant P. claimed through a purchase from the receiver, and stood upon that title, claiming that the mortgage was merged, and the lien thereof extinguished, by the sale under the prior judgment, and by the conveyance of the premises to M., the mortgagee.

Held, 1. That the effect of the judgment, and the failure to redeem, by the judgment debtor or the subsequent incumbrancer, was to transfer the title to the purchaser, and to extinguish all liens inferior to the judgment.

2. That the purchase of the premises by M., the mortgagee, could not have the effect to revive his mortgage as a lien.

3. That upon this view of the case, the doctrine of merger had no just application; for when M. purchased the mortgaged premises, his equitable estate was gone.

4. But that, conceding that when M., the mortgagee, took a conveyance to himself of the fee or equity of redemption, his mortgage lien was in full force and effect, unimpaired by the sale under the judgment, the same was extinguished by being sunk in the legal estate; and could not be upheld by the court, as a lien.

5. That the title acquired by the defendant under the deed from the receiver, was freed from the lien of the mortgage.

When a lien is once extinguished, at law, it cannot be revived again.

THIS action is to foreclose a mortgage, made and executed by Milo W. Hill.

Prior to the 7th day of August, 1855, Hill, the mort-

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gagor, owned the mortgaged premises in fee. On that day the premises became subject to a lien of \$1851, by virtue of the recovery and docket of a judgment against Hill. On the 24th day of August, 1855, Hill executed to one Luman A. Miller a mortgage on the same premises, for the sum of \$5304, and it was recorded in Erie county clerk's office on the 27th of the same month. On the 22d day of November, 1856, the premises were sold on an execution issued on said judgment, and bid in by one Gibbs. On the 4th day of May, 1858, a deed of the premises was executed, by the sheriff, to Edwin H. Gibbs, the assignee of the certificate of sale. On the 1st day of June, 1859, Gibbs conveyed the premises to Miller, the mortgagee, who, up to this time, remained the owner of the said mortgage, never having taken any steps to effect a redemption of the premises, from the sale on said prior judgment.

May 20, 1860, Miller deeded the premises to one Lewis O. Hill. By an arrangement, existing between Miller and one Austin, this mortgage was placed in Austin's hands, who re-transferred it to Miller, and he to the plaintiff. The referee finds that Miller had possession of the mortgage when he deeded to Hill. In proceedings by the creditors of Milo W. Hill, against him and Lewis O. Hill, it was decreed that Lewis O. held the title in trust for Milo W., and in fraud of creditors, and both were ordered to convey to a receiver. The defendant Pixley claims through a purchase from the receiver, and stands upon that title, and claims that the mortgage sought to be foreclosed is merged, and the lien extinguished. Other facts bearing upon the case are stated in the opinion.

The referee held that Pixley's title was discharged from the mortgage, and dismissed the plaintiff's complaint. From the judgment entered thereon the plaintiff appealed.

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R. Saunders, for the appellant.

James M. Humphrey, for the respondent.

By the Court, BARKER, J. The defendant Pixley resists the foreclosure of the mortgage, on the ground that it has ceased to be a lien on the premises. That the sale of the same on the judgment, which was the prior lien, and the purchase by Gibbs, who was a stranger to the title, in law worked an absolute extinguishment of the mortgage lien.

It is not disputed but what Milo W. Hill owned the fee of the land when the judgment was recovered, upon which the sale took place, and that he remained such owner until the time for redemption expired after such sale.

The effect of the sale on the judgment and the failure to redeem, by the judgment debtor or the subsequent incumbrancer, was to transfer the title to the purchaser and to extinguish all liens inferior to the judgment. This result is produced by the provisions of the statute, providing for a lien on land by virtue of a judgment, and a sale thereof under such judgment and a foreclosure of all subsequent liens. If Gibbs, the purchaser, after receiving the sheriff's deed, had sold and conveyed the premises to a stranger, no one would doubt but what such purchaser would have acquired a perfect title, freed from this mortgage, just as Gibbs held the same, entirely exempt from any lien. The purchase by Miller, who was the mortgagee, could not have the effect to revive his mortgage as a lien. No purpose beneficial to Miller would be effected by such an operation. The sale being entirely regular, the fee of the judgment debtor and mortgagor was vested in him, and all other incumbrances by judgment or mortgage, like his own, were legally expunged from the record, so far as this parcel of land is concerned. When a lien is once extinguished in law, it cannot be revived again. (*Ex parte Peter Elwood*, 1 Denio, 633. *McCammon v. Wor-*

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ral, 11 Paige, 99. *Middle District Bank v. Deyo*, 6 Cowen, 732.) It may be observed that when Austin claimed to have acquired an interest in the mortgage, from Miller, the record showed that this sale had taken place and the time for redemption had expired. Thus he had legal, if not actual notice, that this mortgage had ceased to be a lien on the premises.

It seems to be unnecessary to examine and discuss the other proposition of law presented by the defendant Pixley, that upon the principles applicable to the doctrine of merger, the mortgage lien is lost. If the foregoing views are sound, the question of merger has no just application; for when Miller purchased the premises, his equitable estate was gone.

But let it be conceded, as the plaintiff claims, that when Miller took to himself a conveyance of the fee, his mortgage lien was in full force and effect, wholly unimpaired by the sale; then can this court uphold the mortgage as a lien? We think not, upon the facts expressly found and presumed to be found by the referee.

A merger, at law, is defined by commentators to be, "where a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate," then the lesser estate is at once consumed by the greater, or in legal phrase, merged, annihilated. In courts of law, this rule is rigidly adhered to; it is invariable and unchangeable. In courts of equity the rule is more favorable, and the question depends upon the *intention* and *interests* of the person in whom the two estates unite. It is a question of fact, and to be tried the same as other issues in the case. In this case, it was for the plaintiff to maintain that it was not the intention of Miller to suffer a merger or extinguishment of the equitable estate. The referee has not so found, and the presumption is, that he found the very contrary; for, in disposing of the case, on the principles applicable to mer-

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ger, he must have so found, to uphold the legal conclusion. From all the facts and circumstances disclosed by the testimony in the case, this court are of the opinion that conceding that when Miller bought the fee or equity of redemption, the mortgage lien was in existence, the same was extinguished by being sunk in the legal estate. No interest of Miller in the premises could be favored by keeping the security on foot. The dealings between Miller and Austin were not such as to evince an intention, *bona fide*, and in good faith, to keep this mortgage estate in life. Austin was Miller's lawyer. The transaction did not amount to a sale and assignment of the debt secured by the mortgage. At most, it was only collateral to such sum as Miller owed Austin, which is not disclosed. Austin held this mortgage for over eleven years, neither he or Miller seeking to enforce it, and after the title is vested in Hovey, Pixley's grantor, Austin hands back the bond and mortgage to Miller, and takes Miller's note for the sum he owed him. Austin made no advance on the strength of the alleged hypothecation. When Miller received back the bond and mortgage, he transferred it to the plaintiff, and without a written assignment or proving the payment of any consideration for the same, he seeks to enforce it as a lien. In the meantime Miller had sold and conveyed the fee to Lewis O. Hill, a brother of Milo W. Hill. Such title, by the decree of this court, was adjudged to be held for the benefit of Milo W. and in fraud of his creditors. Under the decree of this court, a sale was had and conveyances made for the benefit of such creditors. Upon that title the defendant stands, and he has it freed from this mortgage.

The judgment is affirmed, with costs of this appeal.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. Johnson, Talcott and Barker, Justices.]

VAN CAMPEN vs. KNIGHT.

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By a contract, in writing, dated March 29, 1871, K. of the first part, for the consideration therein specified, to be kept and performed by V. of the second part, agreed to sell to V. certain premises therein described, for the sum of \$2000, to be paid as follows: \$600 on or before the 10th day of April then next, and \$1400 to be paid in three equal annual payments, with annual interest. And it was mutually agreed "that at the time of making the payment of the sum of \$600, and on or before the first day of May next, the said party of the first part shall convey the above described premises to the said party of the second part, by a good and sufficient deed, * * and take back from said second party a mortgage on said premises, to secure the payment of the said sum of \$1400, upon the terms above named;" and that V. might enter into immediate possession. V. took possession, and, on the 12th of April, tendered \$600, with two days' interest, to K., which he refused to accept. On the 17th V. prepared a bond and mortgage, and tendered it to K.; and presented a blank deed for him to execute. He refused to accept the one, or execute the other. In an action by the purchaser, for specific performance,

- Held*, 1. That the fair and reasonable construction of the agreement was, that the making of the first payment, and the delivery of the deed, were to be concurrent acts; such being the manifest intention of the parties.
2. That inasmuch as the clause fixing the time for the delivery of the deed named, first, the very day previously specified for making the first payment, (April 10th,) and, secondly, another day, ("on or before the 1st day of May next,") in order to give certainty to the contract, and enable the court to determine the rights of the parties, under it, one of the days named must be regarded as unintentionally inserted.
 3. That good sense, as well as the justice of the case, clearly indicated the day last named as inserted by mistake; and that after making the first payment of \$600, the remainder of the purchase money was to be secured on the land by bond and mortgage bearing interest from that day, and payable in annual installments on that day.
 4. That the covenant to pay, and the covenant to deed, were dependent obligations, and each was a condition precedent to the other. That the consideration for the payment of \$600 of the purchase money was the delivery of the deed, not the vendor's promise to deliver a deed.
 5. That the plaintiff was not in default, in not paying the \$600 on the 10th of April, for the reason that the defendant did not have in readiness his deed, and was unwilling, then and there, to convey the premises, as promised in his covenant.
 6. That neither party was, either in law or equity, in default, until the other offered to perform his part of the agreement, in full. That both failing to perform their mutual covenants on the contract day, each impliedly waived

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strict performance as to time, and the agreement remained in full force and effect.

7. That the plaintiff had the right to demand of this court the aid of its equity powers, to enforce a specific performance of the agreement. And that he had made a case for the recovery of damages, in an action at law.

THIS is an appeal from a judgment directing the specific performance of a contract, for the sale of real estate. The plaintiff is the vendee, and the defendant the vendor, named in the contract.

The cause was tried at a special term held in Cattaraugus county.

J. B. Finch, for the appellant.

David H. Bolles, for the respondent.

By the Court, BARKER, J. The executory contract entered into between these parties, for the sale of the land in question, is as follows:

"Articles of agreement made this 29th day of March, 1871, by and between Henry Knight, party of the first part, and George Van Campen, party of the second part, witnesseth, that the said party of the first part, for the consideration hereinafter contained, to be kept and performed by the said party of the second part, agrees to sell, and does hereby sell, unto the said party of the second part, for the sum of two thousand dollars, all these lands, (describing them, and containing twenty acres,) to be paid in the manner following, that is to say: Six hundred dollars, *on or before the 10th day of April next*, and the remaining sum of fourteen hundred dollars to be paid as follows: in three equal annual payments, with annual interest on all sums remaining unpaid at the time of each payment. It being the option of the said party of the second part to pay the whole sum remaining unpaid at the time of each payment.

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And it is mutually agreed by and between the parties hereto, *that at the time of making the payment of the sum of six hundred dollars, and on or before the first day of May next, the said party of the first part shall convey* the above described premises to the said party of the second part, by a good and sufficient deed, free and clear of all incumbrances, with the usual covenant of warranty, and take back from the said second party a mortgage on said premises to secure the payment of the said sum of fourteen hundred dollars, upon terms above named, and that the said party of the second part may enter on the said premises to make improvements, or commence farm labor or work, at any time after this date."

On the 4th day of April, following, the plaintiff went into the possession of the premises, and commenced making improvements, with his men and teams. On the 12th of April the plaintiff tendered the first payment of \$600, with two days' interest thereon, which the defendant refused to accept, claiming the plaintiff had not paid as he agreed. The money was then placed in the hands of a third person subject to the defendant's order, and he notified of the same. On the 17th the plaintiff prepared a bond and mortgage and tendered it to the defendant, and also presented a blank deed to the defendant, and asked him to execute the same, and this he refused to do. Then this action was commenced.

The question first to be disposed of is, when, by the terms of the contract, was the vendor to deliver the deed to the vendee. It seems a fair and reasonable construction, that the making of the first payment and the delivery of the deed were to be concurrent acts. Such was the manifest intention of the parties. The clause in the contract fixing the time for the delivery of the deed, first names, specifically, the very day previously named for making the first payment. There is nothing in the remaining part of the sentence, indicating that a different

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day from the one already named was intended, as a time within which the vendor might deliver the deed, except the fact that another day is named. To give certainty to this contract, and enable the court to determine the rights of the parties under the same, one of these days named must be regarded as unintentionally inserted. The good sense of the thing, as well as the justice of the case, clearly indicates the day last named as inserted by mistake. After making the first payment of \$600, the remaining portion of the purchase money was to be secured on the land, by bond and mortgage bearing interest from that day, and payable in annual installments on that very day.

Giving this construction to the reading of the contract, the remaining question has a ready and simple solution.

The covenant to pay, and the covenant to deed, are dependent obligations, and each is a condition precedent to the other. The consideration for the payment of the \$600 of the purchase money, is the delivery of the deed, not the vendor's *promise* to deliver a deed. The plaintiff was not in default, in not paying \$600, on the 10th of April, for the reason that the defendant did not have in readiness his deed, and was unwilling, then and there, to convey the premises, as promised in his covenant. Neither party, either in law or equity, was in default, until the other performed or offered to perform his part of the agreement in full. Both failing to perform their mutual covenants on the contract day, each impliedly waived strict performance as to time, and the agreement remained in full force and effect. The plaintiff, within two days thereafter, offered in all things to execute the agreement on his part, and demanded from the defendant like action on his part, and he refused. The plaintiff has not attempted to stand on his own broken promises. He has the unquestioned right to demand of this court the aid of its equity powers, to enforce a specific performance of the agreement. He has made a case for the recovery of damages in an action at

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law. (2 *Pars. on Cont.* 528, 5th ed. *Grant v. Johnson*, 1 *Seld.* 247. *Leaird v. Smith*, 44 *N. Y.* 618. 2 *Smith's Lead. Cas.* 14, and cases there cited. *Glazebrook v. Woodrow*, 8 *T. B.* 366.)

The decree appealed from should be affirmed, with costs.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Johnson, Talcott and Barker*, Justices.]

WESTFALL vs. PEACOCK.

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A vendor of chattels, upon the refusal of the purchaser to complete the contract, on his part, by paying over the purchase money, has an election, and may resort to one of three remedies: 1st. Upon tendering the property, and after giving the buyer a reasonable time to accept and pay for the property, the seller may regard the contract as abandoned by the purchaser, he being put in default by his refusal to pay. Then the vendor may sell the property as his own, and apply the proceeds to his own use. And it is wholly immaterial, to the buyer, whether, on such sale, the property brings more or less than the contract price, or is sold above or below its value. 2d. The seller may retain the possession of the property, as his security, and sue the purchaser for the contract price. When such payment is enforced and complete, the vendee is entitled to the possession of the property. Or, 3d. The vendor may resell the property, upon giving notice to the vendee, of his intention to do so, and after applying the net proceeds towards payment of the contract price, may sue the purchaser for any balance that then remains unpaid. If more is realized than is due the vendor, he must account to the purchaser for the surplus.

When a vendor pursues the vendee, by action, to recover the whole or a balance of the purchase money, he is acting in affirmance of the contract, and counts upon it.

And having made his election of remedies, by bringing such an action, he has no right, thereafter, to resell the property, or to disaffirm the contract and reclaim the property.

The remedies given to a vendor, upon the refusal of the purchaser to take and pay for the property, are not concurrent. The choice between them having been made, the others are gone forever.

THIS action was tried at the Cayuga circuit in October, 1871, before Hon. H. A. Foster, then one of the justices of this court.

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The cause of action set forth in the complaint was for the purchase price of personal property, alleged to have been sold and delivered, by the plaintiff, to the defendant—being a horse, buggy and harness—at the price of \$385, of which \$35 was paid down at the time of the making of the contract. The answer denied the allegations of the complaint, and alleged that the sale was upon conditions which had not been performed.

The case shows that the plaintiff was the owner of the property, and had the same in the village of Auburn on the day named in the pleadings, and offered to sell it to the defendant, who inspected the same at a barn attached to a public house where the plaintiff was stopping as a guest. The parties agreed upon the price, \$385, and the defendant paid down \$35. An arrangement was made by which the plaintiff was to drive the horse, with the buggy and harness, to his own home, some twenty miles distant, and get the horse shod and deliver the property to the defendant, in Auburn, on the third day thereafter. On the day named, the plaintiff drove the horse to the defendant's stable, and tendered it to the defendant, and demanded the balance of the purchase money. The defendant refused to receive the horse, claiming it was not sound, as bargained for, and hitched it to a post in the streets of the city.

On the same day this action was commenced. After the action was commenced, and on the same day, the plaintiff saw the horse, harness and wagon in the street, standing at the place where the defendant had hitched the horse, the early part of the day. A policeman required that the horse be removed and cared for. Thereupon, the plaintiff took the horse, harness and buggy and drove it to an inn, in the city, and had the horse cared for. The next day, or the one thereafter, he took the property from the inn to his own home, and had it in his possession at the time of the former trial of this action; and he so retained it

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in his possession, until the 21st of May, 1870. On that day he sold the property at public auction, having given the defendant a notice of such sale, in writing, of which the following is a copy :

“ To JAMES H. PEACOCK,

Please take notice that, on Saturday, the 21st day of May, 1870, at 12 o'clock noon, of that day, I shall sell at public auction, at my late residence in the village of Moravia, Cayuga county, N. Y., a certain sorrel mare, single harness and covered buggy, in my possession and belonging to you, unless you shall come, on or before that time, and redeem said property by paying the balance of such purchase price remaining unpaid.

JOHN V. WESTFALL.

Auburn, May 13, 1870.”

At such sale the property brought the sum of \$287.

The plaintiff gave proof tending to show that the contract was completed, on the day the negotiations were opened and the \$35 earnest money paid. The defendant's counsel then moved for a nonsuit, on the grounds :

1st. That there was no evidence of delivery and acceptance of the property in question, by the defendant.

2d. That the plaintiff having afterwards taken, sold and converted the property in question, he could not maintain this action.

The motion was denied, and the defendant excepted.

The case states that it was conceded, by the counsel for the respective parties, that the fact of the sale of the property at auction, by the plaintiff, and the expenses attending its keeping, should be laid out of the case by the jury, except so far as it should bear upon the question of whether the negotiations between the parties, on Monday, resulted in an executed contract.

The court, in a charge not excepted to by the defendant, submitted to the jury the question, whether the con-

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tract made on Monday, the day the negotiations were had, was an executed contract, or not; if it was, then the title to the property passed to the defendant, and the plaintiff was entitled to recover the balance of the purchase money; if they found it was not an executed contract, then the plaintiff could not recover.

The jury rendered a verdict for the plaintiff, for the sum of \$400.60, and the defendant appealed from the judgment entered thereon.

J. T. Pingree, for the appellant.

Jas. R. Cox, for the respondent.

By the Court, BARKER, J. The verdict of the jury disposes of the question whether the contract of sale was made and completed or not. The defendant acquiesces in the finding of the jury, as sustained by the evidence, and on this appeal abandons the first ground upon which he moved for a nonsuit.

The appellant now relies upon the proposition, that the act of the plaintiff, in selling the property, was a disaffirmance of the contract of sale, and a reclaiming of the title of the property, and is conclusive against his right to recover, in this or any other action.

The rule of the common law is, when the bargain is made and completed, the title passes to the purchaser, together with the hazards and risks incident to ownership, and the seller may retain the possession until payment is made, though the title is in the buyer. So far as the purchaser is concerned, his right to the possession depends upon payment, and he cannot take the goods, or sue for them, until he performs by making payment. These rules apply to cash sales, without qualification. (2 *Kent's Com.* 492. 1 *Pars. on Cont.* 525.) The vendor, upon the refusal of the vendee to complete the contract on his part, by

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paying over the purchase money, has an election, and may resort to one of three remedies :

1. Upon tendering the property, and after giving the buyer a reasonable time to accept the property and pay for the same, the seller may regard the contract as abandoned by the purchaser, he being put in default by his refusal to pay. Then the seller may resell the property as his own, and apply the proceeds to his own use. And it is wholly immaterial to the buyer whether, on such sale, it brings more or less than the contract price, or is sold above or below its value. The vendor, by this step, abandons all right of action, against the vendee, and the latter has none against his vendor, even to recover back the whole or any part of the purchase money advanced on the contract.

2. The seller may retain the possession of the property as his security, and sue the purchaser for the contract price. When such payment is enforced and complete, the vendee is entitled to the possession of the property.

3. The vendor may resell the property, upon giving notice to the buyer of his intention so to do, and after applying the net proceeds towards payment of the contract price, may sue the purchaser for any balance that then remains unpaid. If more is realized than is due the seller, he must account to the buyer for the surplus. (*Sands v. Taylor*, 5 John. 395. *Bement v. Smith*, 15 Wend. 497. *Des Arts v. Leggett*, 16 N. Y. 585. *Pollen v. LeRoy*, 30 id. 558. *Lewis v. Greider*, 49 Barb. 606. *Hinde v. Whitehouse*, 7 East, 558.) When the vendor pursues the vendee by action, to recover the whole or a balance of the purchase money, he is acting in affirmance of the contract, and counts upon the same.

At the time of the commencement of this action, the plaintiff had a cause of action of the form and nature set forth in the complaint. Having made this election of remedies, he had no right thereafter to sell the property,

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and the act was a breach of his duty as trustee of the property, if it were not tortious. He is now liable to the defendant, for that act, in a proper action. It is not necessary to decide, in disposing of this appeal, whether the defendant might not, by leave of the court, have, by an amended answer, set up this sale, and asked the plaintiff to account for the proceeds in this action. It does not appear that he made any such request; but from the bill of exceptions it does appear, that all consideration of that view of the case was abandoned, on the trial, by the defendant.

Concede that the pleadings were such that the defendant could urge that the act of the plaintiff in reselling the property, was done in view of abandoning the contract on his part; yet, that was a question of fact to be passed upon by the jury and not by the court, on deciding a motion for a nonsuit. The attention of the court was not called to that question, in submitting the case to the jury.

But the plaintiff, having made his election to affirm the contract and sue for the unpaid purchase money, had no right to resell the property, or to disaffirm the contract and reclaim the property. The remedies given him are not concurrent. The choice between them having been made, the others are gone forever.

Hence it must follow, that the act of selling the property, by the plaintiff, was unauthorized, and if pleaded, would not be a bar to a recovery in this action. (*Morris v. Rexford*, 18 N. Y. 552.)

The judgment appealed from should be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Johnson, Talcott and Barker*, Justices.]

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A *bona fide* holder of commercial paper to which, as between maker and payee, there is a good defence, is entitled to be protected only to the extent of the value which he has paid. MULLIN, P. J., dissented.

If the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*.

There is no reason for any distinction between the case of a purchaser for money, and one where the note is exchanged for property.

In an action upon a promissory note, brought by an indorsee, against the maker, the defendant set up as a defense, that the note was obtained from him, by the payee, by means of false and fraudulent representations made on the sale of a patent right; and gave evidence showing the fraud. The plaintiff claimed to be a *bona fide* holder of the note, for value, and introduced evidence tending to establish that fact. It appearing, by the plaintiff's evidence, that the consideration he gave for this and another note, purchased by him of the payee at the same time, was a span of horses, the defendant offered to show "that the property traded for the notes was not, at the time of the trade, worth more than half as much as the amount of the notes." This evidence was rejected as inadmissible, and the plaintiff obtained a verdict. *Held* that the evidence offered was improperly rejected, and that a new trial was properly granted by the special term, upon that ground.

Held, also, that the evidence was admissible, upon the ground that where the question is as to whether the plaintiff is a holder in good faith, all the circumstances of the transfer, and the relations and dealings between the parties, are admissible in evidence. That the fact that the plaintiff gave, in horses, but fifty cents on the dollar for the note of a perfectly responsible party, and within four days after the note was given, was a circumstance clearly admissible to be proved, on the question of good faith.

Held, further, that the evidence was not inadmissible because not pleaded; the fact that the note was obtained by fraud having been proved without objection, and the evidence rejected being upon the issue presented by the plaintiff in reply to the defense of fraud, and coming in by way of rejoinder to the plaintiff's reply.

A PPEAL from an order setting aside a verdict rendered for the plaintiff at the Orleans county circuit, and ordering a new trial.

The following opinion was delivered at the special term, by the justice before whom the motion was made, upon exceptions taken at the trial:

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DANIELS, J. This action is on a promissory note, made by the defendant, on the 12th of July, 1869, by which he promised to pay to Phineas Strong, or bearer, the sum of \$500, with interest, in three months after the date thereof. This note, the evidence showed, was procured from the defendant by a man named Ferguson, and when it was obtained by him, it was stated in the case, it was obtained by Ferguson by fraud. By giving the effect to these terms which their import will fully justify, it must follow that Ferguson could not have recovered upon the notes against the defendant, for as between them he was entitled to avoid the note by reason of the fraud through which it was obtained; and as the defendant was not shown to have received anything of value from Ferguson, and consequently had nothing to return to entitle him to rescind, the proof of the fraud alone was sufficient to warrant that result. It appeared upon the trial that the plaintiff bought four notes of Ferguson—the note in suit and one against Finch—on one day, for which he gave him a brown horse and brown mare, and two other notes on the following day, for which he gave him a pair of bay horses and running mare. After the plaintiff had rested his case, and after it had appeared that the defendant's note had been procured by fraud, the defendant offered to prove that the property traded for these two notes was not worth more than half as much as the amount of the notes. The plaintiff objected to the evidence, and the court held it to be inadmissible; to which ruling the defendant excepted. In support of this ruling the plaintiff's counsel claims that the terms (these two notes) included in the offer did not relate to the note in suit, and the other one purchased with it by the plaintiff, but as the terms on which the others were purchased was in no way involved in the issue on trial, and they were notes the defendant had no interest in, and was no way liable on, that construction of the offer cannot properly be adopted, particularly as no

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such reason was specified in the objection to the admissibility of the evidence.

The terms mentioned must have been designated to refer to the note in suit, and the other one bought by the plaintiff with it at the same time, and in the same trade; and as so construed, the offer was to show that the defendant's note and the note against Finch, bought with it by the plaintiff, was recovered by him for property not worth more than half as much as the two notes. If the note in suit had been a valid obligation in Ferguson's favor against the defendant, this evidence would have been very clearly inadmissible; for he having a legal right to recover the full face of the obligation against the defendant, could have sold it for any price he deemed proper, or even given it away, and the debtor would have no right to complain of the disposition made of it. He would have been liable, in such a case, to the full extent of his promise, to any person acquiring title to the paper containing the evidence of it; but that was not its character in Ferguson's hands. || The defendant could have avoided his liability on the ground of the fraud of the former, by means of which the note was obtained. This was sufficient to prevent him from transferring any better right to the vendee than he had himself, unless the latter received it in good faith, and for an actual consideration parted with for its consideration. It is the parting with value under such circumstances that the law endeavors to protect him for; hence where there is a writing, and for that reason no possible loss can occur to the purchaser by a failure to recover on the paper, he stands in no better relation than the person did from whom he received it, and consequently is not permitted to recover upon it. The reason of the rule would seem to be as cogent against him for the amount which the promised debt exceeds the amount paid for it. The holder held it under such circumstances that it could only be rendered a valid obligation against

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the maker by being transferred by the holder to a purchaser, advancing value upon it in good faith. And as the value gave it validity, it would appear to follow that its validity, acquired from that source, could be no more extended than the value actually received.]]

This was held by the chancellor to be the law, in the case of *Stalker v. McDonald*, (6 *Hill*, 93, 96.) He came to that conclusion under the general principles of equity applicable to the protection of *bona fide* purchasers, as well as on the authority of *Edwards v. Jones*, (7 *Carr. & Payne*, 633,) where the holder of a note for £100 was only permitted to recover against the maker the amount paid for it to the indorser, because it was not a valid obligation in the hands of the latter against the maker. The same ruling was made under circumstances presenting this point, in the cases of *Simpson v. Clarke*, (2 *Crompt., Mees. & Rosc.* 343 ;) *Petty v. Hanmann*, (2 *Hump. [Tenn.]* 102;) *Holman v. Hobson*, (8 *id.* 127, 129;) *Nash v. Brown*, (*Chitty on Bills*, n. X., p. 74, 10th *Am. ed.*) And in effect it is sanctioned by *Beaman v. Hess*, (13 *John.* 52.) Between such parties, the consideration of the paper is open to examination and inquiry.

The holder of such paper, and paper made for the accommodation of the holder, can recover nothing upon it against the maker himself, and he can place no other person in any better situation in that respect than himself, unless the person receiving the paper from him has so far changed his position, upon its faith, as to render the principle governing the case inapplicable to him on account of the injustice it would otherwise produce. For the protection of such purchasers, the law permits the original holder to transfer to the vendee such a right to recover upon the paper as is required to indemnify him against loss. But neither the principle nor the justice of the rule can require it to be extended any farther. It would be clearly unjust to allow the purchaser to make a profitable

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speculation out of paper on which the maker can only be held liable for the purpose of affording him such a degree of protection as his reliance upon the appearance presented by it may indicate to be equitably necessary in order to save him from loss. Courts of equity, from which the legal rules affecting commercial paper in this respect are derived, do not extend their protection in favor of the purchaser, against the equities of others, beyond that limit, and no good reason can exist for rendering them more effective in a case like the present one.

The plaintiff should recover what he has advanced to the person from whom he received the paper on the faith of it, and he should recover no more than that, because it was not valid in the hands of the person from whom he received it, against the defendant, for anything.}] For that reason the evidence offered ought to have been received.

It is not necessary to consider whether the evidence proving the fraud was properly admissible under the state of the pleadings, for no objection was taken upon the trial. If any such objection could have been properly taken, it was waived by the omission to make any reference to it.

The verdict should be set aside, and a new trial ordered, with costs to abide the event.

Holmes & Thompson, for the appellant.

I. The refusal to charge as requested was correct. No fraud in obtaining the note having been alleged in the pleadings, the question of good or bad faith on the part of the plaintiff in purchasing the note could not properly be submitted to the jury. The only question for them to pass upon, under the pleadings, was, 1st. Did the defendant execute and deliver the note in question? 2d. Had the plaintiff legal title to the note? (*See point 3, as to pleadings.*) Again; if properly raised by the pleadings, the refusal to charge was still correct for the following

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reasons, viz: 1st. No evidence appears in the case warranting the jury to find such facts to exist, even though the law was as claimed. 2d. The rule of law is not as the counsel requested the court to charge. The counsel intended, no doubt, to invoke the rule once held in England, to wit: "That the title of the holder of negotiable paper would not be protected when it had been acquired under circumstances which ought to have excited the suspicion of a prudent and careful man." This is not the rule now in England. The true rule on this question in that country, as now settled, is as laid down by Lord Denman, C. J., in *Goodman v. Harvey*, (4 *Adol. & Ellis*, 870.) "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe that we are all of opinion that gross negligence only would not be a sufficient answer when the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnants of the contrary doctrine. When the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title." The rule, as above laid down, has ever since been followed in England. (*Uther v. Rich*, 10 *Adol. & Ellis*, 784. *Raphael v. Bank of England*, 33 *Eng. Law and Eq.* 276. *May v. Chapman*, 16 *Mees. & Wels.*, 355. *Chitty on Bills*, 257, 12th ed.) The same rule has been adopted in this country; and the decisions are uniform in regarding it as settled law. (*Goodman v. Simmonds*, 20 *How. U. S.*, 343. *Hall v. Wilson*, 16 *Barb.* 550; 30 *id.* 464. *Edwards on Bills*, 309. *Story on Bills*, § 416. *Story on Notes*, § 282. *Cothran v. Collins*, 29 *How.* 113. 2 *Parsons on Bills and Notes*.) In *Parsons on Bills*, last above referred to, after citing the authorities, the author says that the law is settled both in England and America as follows: "The title of such holder is not defeated by proof that he was negligent or grossly negligent in taking the note or bill, and

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that he omitted to make inquiries which common prudence would have dictated."

II. The charge of the judge to the jury was not erroneous in any respect. There was no evidence given on the trial establishing *mala fides* in the plaintiff. The evidence did not show gross, or slight negligence, or even suspicious circumstances. The jury could not have been justified in finding there was bad faith on the part of the plaintiff, from the evidence in the case. The plaintiff kept a livery stable and dealt in horses. Ferguson was introduced to him by an acquaintance, and a business man in the village where they both resided, who knew he had horses to sell. Ferguson examined the horses the plaintiff had for sale, and ascertained the price the plaintiff asked for them. After this Ferguson wished to turn out notes for them. The plaintiff was unacquainted with the defendant and went into the street and inquired concerning his circumstances, and found him to be responsible, returned to the stable and agreed to take the notes for the horses. It was an ordinary transaction, conducted in the ordinary manner. At the time these notes were purchased, fraudulent patent right notes had not become as notorious as since, and still there are very few men in the different towns of our county that have ever heard of them. The suit by Foster on a patent right note, spoken of in the plaintiff's evidence, was tried after the plaintiff purchased this note, at a circuit held in Orleans county, and was the first case on a patent right note tried in the county, and in this case the plaintiff recovered on the note. The plaintiff swears that he had not heard there was trouble about patent right notes in Orleans county, and had heard nothing about these notes before purchasing them. On the question of *mala fides* there was absolutely nothing to go to the jury, and the charge of the judge was eminently proper. Justice DANIELS, in his opinion, holds that the plaintiff is a *bona fide* holder and

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entitled to protection. Again; the question was not raised by the pleadings, as stated in our first point.

III. The defendant offered to prove, "that the property traded for these two notes was not worth more than half as much as the amount of the notes." This was objected to, and by the court excluded; to which the defendant excepted. 1. This was an action at law, and no claims for equity was set up in the answer. The answer was a specific denial, according to section 249 of the Code. The answer must contain, first, a general or specific denial of each material allegation of the complaints, controverted by the defendant, &c.; second, a statement of any new matter constituting a defense. The question then is, whether the defense offered consisted of new matter, or whether it merely disproved any of the material allegations of the complaint. We say, that by the pleadings all evidence offered, giving effect to a defense of fraud, was new matter, and was properly rejected, and until the answer was amended, any evidence introduced upon that subject must be regarded as immaterial. And the plaintiff had a right to oppose its introduction at any stage of the trial. If the evidence of fraud, in this case, has been incidentally admitted in an attempt to prove that the defendant never gave that particular note, or had been admitted otherwise, short of an amendment of the answer—the plaintiff's case would still have been unaffected—unless the proof offered had been admitted and became a part of the case. The plaintiff here, for the first time, had an opportunity to object to this class of evidence. In short, the same right that the plaintiff had to object to the whole defense of fraud, authorizes him to object to any part of it, or to any evidence bearing upon that question, not necessary to sustain the denial of the allegations of the complaint. (*See remarks of Jewett, Ch. J. in Ferguson, adm'r, v. Ferguson, 2 N. Y. 360.*) Also his remarks in *Kelsey v. Western, Id. 501, 506.*) In the case of *Bailey v. Ryder, (10 N. Y.*

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363,) it is held "that no decree can be made in favor of a complainant on grounds not stated in his bill. Also that in proceedings in equity, if fraud is not alleged in the pleadings, no proof of it can be properly received." The court further says: "He (the complainant) should have amended his bill, and stated the facts on which he meant to impeach it. The defendants would have been required to answer such facts, and if denied, it would then have been competent to have supported the allegations by proof." (*Citing the case in 2 N. Y. above referred to.*) *See, also, Richtmeyer v. Remson*, (38 N. Y. 206.) 2. Had the defendant alleged fraud, in his answer, the plaintiff might have well supposed that the question of his being a *bona fide* holder, would have arisen, and he could have been called upon to meet any defense consequent to that defense. As it was, the defendant was taken by surprise, and without witnesses to litigate the value of the property he gave in exchange for the note in suit, as well as the note not in suit. He would also have had the right to show, by witnesses, that the other note was worthless. Had the defendant, upon a discovery, at the trial, that the element of fraud was in the case, amended his answer, the plaintiff would have been allowed sufficient time to obtain witnesses, and prepare to defend the new issue. He would also have been allowed his costs of the circuit. 3. Justice DANIELS, who decided this case at special term, says, in regard to this question of the pleadings: "It is not necessary to consider whether the evidence proving the fraud was properly admissible under the state of the pleadings, for no objection was taken upon the trial. If any such objection could have been properly taken, it was waived by the omission to make any reference to it." If the learned justice referred to this offer, we submit that it was objected to upon all grounds that could have been specified. The objection being general, the court sustaining the objection, is presumed to have decided upon all the

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grounds by which it could have been excluded. In the case of *Streety v. Wood*, (15 Barb. 105,) the court states the law to be as follows, viz: "When evidence offered is objected to and excluded, and neither the grounds of objection, nor the object of the proof is stated, and the court can see that a good objection might have been taken, it will presume that the proper objection was taken, and the decision made upon that ground." It must be regarded then, that the plaintiff objected to this evidence, on the ground, among other things, that it was inadmissible under the pleadings, and that the plaintiff, by reason of not being notified by the defendant's answer of this defense, was not prepared to meet it. He had already shown that the defendant gave the note in suit, and that he—the plaintiff—had the legal title. When he had done this, the issues in the case had been disposed of, and everything else became and was entirely immaterial. 4. The plaintiff being a *bona fide* purchaser for value, and in good faith, was entitled to recover against the maker the full amount of the note; and the rule invoked by the learned justice at special term, has no application to this case. In an action by an indorsee against his immediate indorser, it is settled that the consideration paid on the transfer, and interest thereon, is the measure of damages, but the application of this rule, as between the *bona fide* purchaser and the maker, has never been established as the law in this State, as we contend. In *Stalker v. McDonald*, (6 Hill, 93,) the only point decided is, that the holder of a note, transferred as collateral security for an antecedent debt, is not entitled to protection as a *bona fide* holder for a valuable consideration. It was said by the chancellor in that case—not "held," because no such question was before the court—that "It has been uniformly held by the courts of equity in such cases that the purchaser who has obtained the legal title as a mere security or payment of a preëxisting debt, without parting with anything of value, is not en-

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titled to hold the property as against the prior equitable owner; and if he has paid but a part of the consideration, or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*." By this language we claim the chancellor only intended to assert that when a note had been taken, partly as security for, or in payment of, a preëxisting debt, and partly for cash or other valuable consideration, he was owner only of that portion of the note for which he paid value, and was not the owner as to the residue, as against the true equitable owner of the note. In *Braman v. Hess*, (13 John. 52,) the point passed upon is, that as between the indorsee and his immediate indorser, the consideration of the transfer may be inquired into, and the amount to be recovered by the indorsee against his immediate indorser is only the amount paid, with interest. The court, in that case, says: "If this suit was by the indorsee against the maker of the note, it would not lie in his mouth to say the plaintiff purchased it at a discount." In *Cardwell v. Hicks*, (13 How. 281,) the same circumstances existed as in the case supposed by Chancellor Walworth, in *Stalker v. McDonald*, above cited. The note had been turned out to the plaintiff partly in payment and extinguishment of a preëxisting debt, and the balance had been paid in money by the purchaser. The court held he was not a *bona fide* purchaser for value as to so much of the note as was received on his antecedent debt, and that the defense of the maker was good to that amount. This is not the law now, at all events, and when made, the decision was really placed upon the ground that he was not owner of only that part of the note for which he had paid value. In *Edwards v. Jones*, (7 Carr. & P. 633,) cited by Justice DANIELS, the case was decided on the pleadings, and by the pleadings the plaintiff only claimed the amount he paid for the note. This question was not discussed, and was not passed upon in any other manner than as being all claimed by the plaintiff. In

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Russell v. Ball, (3 John. Ch. 91,) the question was, whether the maker could be permitted to impeach the note by showing that it was fraudulently obtained, and without showing that the indorsee was not a fair and *bona fide* holder for a valuable consideration. The court held, that in such case the maker is never permitted to go into the real consideration of the note, unless it be such as to render it void by statute, or unless it had become due before it was transferred. In *Gould v. Segee*, (5 Duer, 260,) the note was transferred partly in payment of a precedent debt, and partly for money paid at the time. The court says, Duer, J.: "But had there been no other consideration proved for the transfer of the note, than the payment in money that was made by Palmer, we are not to be understood as intimating that the plaintiff would not be entitled to recover. When, in cases like the present, a parting with value is proved, the amount of the consideration is not otherwise important than as bearing on the question of actual or constructive notice." This authority is cited approvingly by Justice Hogeboom, in his opinion in *Essex Co. Bank v. Russell*, (29 N. Y. 673.) *Park Bank v. Watson*, (42 id. 490,) is directly in point. It was alleged that the note had been fraudulently diverted. The plaintiff took the notes as collateral security for the note of the holder, for which he held other notes as security, which notes he surrendered. One of the notes surrendered, for \$1180, was against an irresponsible party. The counsel for the defense requested the court to charge that the plaintiff could not recover for any amount beyond that which remained after deducting the worthless note. The court refused, and the counsel excepted. The Court of Appeals, Lott, J., sustained the refusal, and held that the plaintiff was entitled to recover the full amount of the notes. 5. We now come to the case at bar. The court will notice that this is not such a case as is contemplated by the cases heretofore cited. The value parted with was

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property consisting of two horses, a running mare, a harness and a carriage. A debt was created between Ferguson and the plaintiff, which was extinguished at the same time. (16 *Peters*, 20.) The plaintiff set a price upon his property, and made a special contract in regard to the same. The question here then, is, whether it is the law that special contracts, made by the purchaser in good faith, can be set aside and a jury determine as to how much he should be allowed in the premises, or for the property he has parted with, and which cannot be restored. We submit that this is not the law. Such a doctrine would, to a great extent, destroy the benefits intended to be derived from the commerce of negotiable paper. The law is well settled that as between a maker and payee, although there was not adequate consideration for the whole amount of the instrument, yet as it could not be readily shown to the jury to what precise extent the consideration had failed, the plaintiff was entitled to recover the whole. It is said in *Chitty on Bills*, 76, 10 *Am. ed.*: "And it seems to be an established doctrine, that the partial failure of consideration will constitute no defense if the *quantum* to be deducted on that account be *unliquidated*, and not in the nature of a certain debt or deduction." "Thus, if a bill be given for the price of goods, it has been held to be no ground of defense to a part that the price of goods was exorbitant," &c. (See also *Washburn v. Picot*, 3 *Dev.* 390.) If the payee is not subjected to this defense, it is difficult to see why the *bona fide* purchaser from the payee should be. The same reason which holds good in the one case is equally good in the other. We submit that the *bona fide* parting with property for a note or bill is a parting with value, sufficient to make the purchaser a *bona fide* holder to the whole extent of the bill. 6. The offer embraced too much. It should have been confined to the value of the note, and not to the nominal amount. Equity would call for the cash value of the notes on the one side,

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as well as the cash value of the property on the other. 7. The offer should have been confined to the note in suit. The plaintiff could not be compelled to litigate questions arising upon the other note, in this action. To prove the offer as made would not have established any certain fact in regard to this note.

Geo. Bullard, for the respondent.

I. The note originated in fraud, and the plaintiff cannot recover upon it unless he obtained it in the usual course of business, in good faith, and for full value. (*Magee v. Badger*, 34 N. Y. 247. *Belmont Branch Bank v. Hoge*, 35 id. 65. *Hall v. Wilson*, 16 Barb. 548. *Miller v. Race*, 1 Burrow, 458.) The evidence rejected was competent to limit the amount of the recovery, even if the plaintiff acted in good faith. X It is not necessary to sustain the credit or circulation of negotiable notes, that the plaintiff should be allowed to speculate in fraud at the expense of the defendant. He is abundantly protected by giving him the value of what he innocently advanced on the faith of the paper. X And the cases hold that he can recover no more. (*Story on Promissory Notes*, § 191. *Stalker v. McDonald*, 6 Hill, 93. *Williams v. Smith*, 2 id. 301. *Cardwell v. Hicks*, 37 Barb. 458. *Youngs v. Lee*, 18 id. 189; affirmed 12 N. Y. 552.) Judge DANIELS granted a new trial upon this ground. The fact that a note against a responsible farmer, with less than three months to run, is offered in exchange for property at twice its value, is evidence of some infirmity in the note. Men do not make such trades, in the ordinary course of business. Nor was it any part of the plaintiff's business to deal in notes, and buying \$1250 worth of this kind, of a perfect stranger, was not only an unusual and extraordinary transaction, but was entirely outside of his business. The evidence offered, together with that already in the case, would have justified the jury in finding that the plaintiff did not get

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the note, either in good faith or in the ordinary course of trade. (*Wilcox v. Howell*, 44 Barb. 396. 1 Para. on Bills and Notes, 259).

II. Proof of fraud in the note created a presumption against the plaintiff, which he was bound to rebut, by showing affirmatively that he obtained it in good faith, for full value, and in the ordinary course of trade. The judge committed an error in refusing to charge in accordance with this rule of law. (2 Greenl. on Ev. § 172. *Potter v. Chadsey*, 16 Abb. 146. 5 Pick. 412. *Catlin v. Hansen*, 1 Duer, 322. *First National Bank v. Green*, 43 N. Y. 298.)

III. Some defense to a note must always be established before the question of good faith arises, as the only object of showing good faith is to cut off such defense as may be proved. And a defense to the note must, therefore, in all cases, become an element, whenever the question of good faith is considered. Judge ALLEN says, in *Hall v. Wilson*, (16 Barb. 535:) "Although the defense of usury is not alleged in the answer, and cannot, therefore, be relied upon by itself as a defense to the action, it may be alleged in impeachment of the good faith of Bigelow; and being established, takes away all pretense of the *bona fides* of the transaction." The evidence of fraud was received without objection on the trial, and referred to by the judge in his charge. If the objection had then been raised, it might have been obviated by an amendment of the pleadings. (*Barnes v. Perine*, 2 Kern. 18.)

TALCOTT, J. This is an action on a promissory note made by the defendant and delivered to one Ferguson. The defendant claimed that the note was obtained from him by Ferguson, by means of false and fraudulent representations made on the sale of a patent right, and the case states that "the defendant gave evidence showing that Ferguson obtained the note from him by fraud." The plaintiff claimed to be a *bona fide* holder of the note for

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value, and gave evidence tending to establish such fact. It appeared, by the plaintiff's evidence, that the consideration he gave for this and another note purchased by him of Ferguson, at the same time, was a span of horses. After this evidence, the defendant offered to show "that the property traded for the notes was not, at the time of the trade, worth more than half as much as the amount of the notes." This evidence, being objected to by the plaintiff, was held by the court to be inadmissible; to which decision the defendant excepted.

The plaintiff had a verdict, under the instruction of the court, that he was a *bona fide* holder, and was entitled to recover on the note, notwithstanding the fraud practiced by Ferguson in obtaining the note. The special term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value which he has paid. This, I think, is correct. ¶ The protection of the holder for value in such cases, as in other cases where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. ¶ And this is the precise reason why a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded; namely, that he has lost nothing by his reliance upon the face of the paper. ¶

These principles are discussed and laid down in a very elaborate opinion of the late chancellor, delivered in the court of errors in the leading case of *Stalker v. McDonald*, (6 Hill, 93,) in which he expressly holds that if the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*, and refers with appro-

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bation to the case of *Edwards v. Jones*, (7 Carr. & P. 633,) in which, in an action on a note for £100, the consideration of which was impeached by a plea, the plaintiff replied that it was indorsed to him for the consideration of £49. And he was only permitted to recover the £49 advance.

The proposition sought to be maintained by the counsel for the appellant in this case, namely, that whatever may have been the consideration of the transfer of a negotiable note, if it was a valuable one, the holder without notice of the invalidity of the note, may recover the entire face thereof, without reference to the amount paid by him for it, would produce most unjust and startling results. It would enable the holder of a stolen note for \$1000 to recover the entire amount thereof from the maker, from whom it had been stolen, although the holder had purchased the same without notice, for only \$100—a result revolting to common sense, and going far beyond affording that protection which public policy requires should be extended to parties who purchase negotiable paper for value. I see no reason for any distinction between the case of a purchaser for money, and one where the note is exchanged for property. If such a distinction could be made, the maker of the note could have no protection. Such notes would then be used in the purchase of property, as in this case, instead of sold for money. The purchaser is fully protected against loss by being enabled to recover the full value of the property parted with on the purchase.

The doctrine laid down in *Stalker v. McDonald* was also expressly held in *Williams v. Smith*, (2 Hill, 301,) and in *Youngs v. Lee*, (18 Barb. 189;) in which Mr. Justice Welles, delivering the opinion of the court, says: "It follows that the plaintiffs are *bona fide* purchasers and holders of the note upon which the action is brought, and entitled to recover from the indorsers the amount they paid for it, with interest, and no more." The case of *Young v. Lee* was

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affirmed on appeal. (2 Kern. 534.) The same principle was also asserted in *Cardwell v. Hicks*, (37 Barb. 458.) The truth is, that in such cases (the holder, except so far as he has parted with value, has no equity superior to that of the party defrauded.) There is a remarkable silence on this precise point, in most of the elementary works I have examined. It is, however, explicitly laid down in *Story on Bills*, (§ 188,) that where a bill has been obtained by fraud, a *bona fide* holder can only recover the amount he has advanced. (The English cases, where a question of this character appears to have been presented, appear, generally, to have been between the *bona fide* holder and the accommodation maker or indorser; and in such cases it has always been ruled that the holder only recovers the amount of his advances.) (See *Ohitty on Bills*, 81. *Nash v. Brown*, *Id.* 85, note 1. *Wiffen v. Roberts*, 1 Esp. 261. *Jones v. Hunt*, 2 Stark. 304. *Simpson v. Clarke*, 2 Crompt., Mees. & Ross. 343.)

I do not perceive any reason why a *bona fide* holder for value may not recover the full face of the note, without regard to the amount he has advanced, as well where he sues a mere accommodation maker, as where he sues one from whom the note has been obtained by fraud. In either case the amount of the recovery is limited to the amount advanced by the holder, because there was no sufficient valid and valuable consideration for the making of the note, and the right to recover at all, grows out of the advance which has been made by the holder, which gives it validity in his hands to that extent. I think the discussions and opinions in the English cases show that this point has not been considered debatable, where the note was obtained by false and fraudulent representations. Indeed I think that until quite recently it has been assumed at *nisi prius*, in this State, that a holder of such paper for value, and without notice, was entitled to be protected to the extent of his advances, and no more. The point has

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been expressly decided in *Holman v. Hobson*, (8 *Humphrey*, [Tenn. R.,] 127,) and in *Bettarue v. McCrary*, (8 *Georgia*, 114.)

It is claimed, by the counsel for the respondent, that the case of the *Essex County Bank v. Russell*, (29 *N. Y.* 673,) countenances the doctrine maintained by him. There a bank had discounted or purchased a note which was diverted, and gave as the proceeds of the discount, a part in cash and the balance in a note held by it, made by one Brewster and indorsed by other parties, which was past due and under protest. The bank was allowed to recover the whole amount of the diverted note, on the ground that it was a *bona fide* holder for value, and upon the express ground that the Brewster note, which constituted a part of the consideration on the purchase, although under protest, was worth its nominal amount, and was good and collectable. And the principle laid down in *Stalker v. McDonald*, on this point, seems to have been expressly recognized as the law. Mr. Justice Hogeboom says, speaking of the plaintiffs, (the bank,) "they were, therefore, on discounting this note, *bona fide holders* of it for value, at least to the extent of the sum advanced in cash, on the discount; and to that extent, at all events, they would be entitled to recover in this action, * * * it becomes necessary to determine whether the plaintiffs are *bona fide* holders of the note in suit, in such a sense as to exclude the defense of its misapplication, so far as respects that part of the discount which was appropriated to the purchase of the Brewster paper. *There was no want of consideration on the part of the plaintiff to the full amount of the note in suit, in the transaction in question. The Brewster note was, though over due, good and collectable paper. It was worth its nominal amount, and was collectable for two years afterwards. It was a chose in action which the plaintiffs had a right to sell and transfer to Comstock. To the full extent of its value, it was a valuable consideration.*"

The case of the *Park Bank v. Watson*, (42 *N. Y.* 490,) is

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claimed by the counsel for the appellant to have overruled the former cases on the subject, and to have established the doctrine for which he contends. In that case, the Park Bank had surrendered notes held as collateral security for a debt due it, on receiving the notes in suit, which proved to have been diverted. One of the notes surrendered was the note of Thomas Parks, shown on the trial to be irresponsible. The defendant's counsel had requested the court to charge, "that the plaintiff cannot recover for any amount beyond that which remained after deducting the Parks note." The request being refused, an exception was taken. The only opinion in the case is that of Judge Lott, who says: "The surrender of those notes, under the decision in *Brown v. Leavitt*, (31 N. Y. 113,) and the cases there cited, made the bank a holder for value, and entitled it to recover the full amount claimed in those actions, without deducting the amount of the note of Parks."

The question in *Brown v. Leavitt* was simply whether the surrender and delivery up to the debtor of an existing note, and receiving another in payment of it, constituted a valuable consideration within the meaning of the rule which protects a *bona fide* purchaser for value against defenses existing between prior parties; and neither in that case, nor in any one of the cases there cited, was any question presented like that in the case at bar; unless it be in the cases of *Stalker v. McDonald*, and *Youngs v. Lee*, (*supra*,) in which cases the doctrine laid down was, as we have seen, directly contrary to the position of the appellant here. I have looked into the original points and case, on the argument in the Court of Appeals of *The Park Bank v. Watson*, and find that it was claimed there by the plaintiff that, notwithstanding the evidence touching the irresponsibility of Parks, the maker of one of the notes surrendered, his note was nevertheless of value, and would probably have been paid. It cannot be affirmed that a

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particular note of a party, shown to be of the character and in the position such as that of Parks, is wholly valueless. Now the request of the counsel for the defendant in that case was, that the judge charge that the entire amount of the Parks note must be deducted from any recovery. Upon well settled practice, this request was too broad, as the note of Parks had some value, and an exception to the refusal to charge as requested was therefore unavailable, and the remark of Justice Lott, which has been quoted, so far as it is supposed to countenance the idea that the holder of negotiable paper, in good faith, for value, to which there is a defense as against the party from whom the holder received it, may recover the full face of the paper, without regard to the amount he has paid for it, if not inadvertent, was at least unnecessary to the decision, and wholly unsupported by the authorities on which it is supposed to have been placed. We think, therefore, that the evidence rejected was admissible, upon the ground taken by Mr. Justice DANIELS in the opinion delivered by him at the special term.

But we think the evidence was also admissible upon another ground. Where the question is as to whether the plaintiff is a holder in good faith, all the circumstances of the transfer, and the relations and dealings between the parties are admissible in evidence.

The price paid upon the purchase is one of those circumstances, and usually a most material one. The other evidence in the case tended to cast some suspicion on the *bona fides* of the plaintiff's holding; and we think that the fact that the plaintiff gave in horses, but fifty cents on the dollar, for the note of a perfectly responsible party, and within four days after the note was given, was a circumstance clearly admissible to be proved on the question of good faith. Direct notice cannot usually be proved. Fraud, or want of good faith, is usually to be inferred from circumstances.

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The plaintiff's counsel insists that the evidence rejected was inadmissible because not pleaded. It was not requisite that it should be pleaded. The fact that the note was obtained by fraud from the defendant, by Ferguson, had been proved, without objection. The evidence rejected was upon the issue presented by the plaintiff in reply to the defense of fraud in obtaining the note, and came in by way of rejoinder to the plaintiff's reply.

The order, setting aside the verdict and granting a new trial, should be affirmed.

JOHNSON, J., concurred.

MULLIN, P. J. I concur with my brethren in the conclusion that there should be a new trial in this case, on the ground that the evidence of the value of the horse was competent upon the question of the *bona fides* of the plaintiff's purchase of the note. But until the case of the *Park Bank v. Watson* (42 N. Y. 490) is reversed, I cannot agree that the plaintiff, being a *bona fide* holder, was entitled to recover only the value of the horses.

Order granting a new trial affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Mullin*, *Johnson* and *Talcott*, Justices.]

HARGER and others vs. WILSON.

A note, valid in the hands of the holder, is property, which may be sold at any price.

The price paid, on the purchase of a promissory note, may go to the jury on the question of good faith; but it cannot, as a matter of law, be held to impeach the title of the holder who is otherwise a purchaser in good faith, for value, and without notice.

Where the maker has intentionally issued a promissory note and put it in circulation as a valid note, although induced to do so by the fraud of the payee, and the same is purchased, by a third person for a valuable consideration and without notice, though at a discount greater than the lawful interest, the latter may maintain an action thereon as a *bona fide* holder.

The *bona fide* holder of a note which has been obtained from the maker by fraud, has no equity, as against such maker, to be protected beyond the amount of the advances he has made, upon the faith of the note. MULLIN, P. J., dissented.

A PPEAL, by the defendant, from a judgment entered upon a verdict.

The action was brought to recover the amount of a promissory note made by the defendant, for \$1000, with interest, dated May 25, 1869, payable seven months from date, at the Union National Bank, to William B. Nicholson, or bearer. The note was transferred by the payee, Nicholson, before maturity, to wit, the 27th of the same month, by his agent, one Spencer, to the plaintiffs, bankers and brokers, at Watertown, N. Y.

The grounds of defense set up in the answer were: 1. That the note was fraudulent in its inception, and without consideration, and was obtained of the defendant by the payee, Nicholson, and one J. Goodrich Scott, (together with five other notes of a like amount each;) and that the plaintiffs are not *bona fide* holders. 2. The note not having had a legal inception, and being without consideration, was negotiated to the plaintiffs at a usurious rate of interest, and is void. The interest was at the rate of twenty-six per cent per annum, \$900 being the amount paid by the plaintiffs for the note.

The cause was tried at the June circuit, in Jefferson

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county, 1871, before Justice DOOLITTLE and a jury. The fraud in the inception of the note was proven. Indeed it was not attempted to be disproved at the trial. The worthlessness of the patent right, the alleged consideration of the note, was shown by the testimony of several witnesses.

At the close of the evidence, several propositions were submitted to the court, with reference to the law of the case, by the defendant's counsel, which were overruled, and an exception allowed. The jury, under the direction of the court, rendered a verdict for the plaintiffs for \$1143.74, on which judgment was entered, and from which the defendant appeals.

B. Winslow, for the appellant.

I. The counsel for the defendant requested the court to hold and decide, that the note in suit "having been obtained by the payee by fraud, when he transferred it to the plaintiffs for \$900, it became usurious and void, and that the plaintiffs' purchase of the note at that price prevents their being *bona fide* holders." As to this request, the court held, "that assuming that the note was obtained by the payee of the maker, by the false pretenses alleged, and that the patent right was worthless, (referring to the consideration of the note,) its transfer by him (the payee) for \$900 did not make the note usurious and void, and that the purchase of the note by the plaintiffs, of the payee, for the \$900, did not prevent their being *bona fide* holders." This ruling was erroneous. If the patent right for the purchase of which the note was given, (without reference to the fraud by which it was obtained,) was worthless, the note was without consideration, and was void in the hands of the payee. It had no more validity in his hands, and payment could no more be enforced by him, than if it had been an accommodation note of the maker, or a note borrowed of the maker to negotiate. In *Powell v. Waters*,

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(8 Cowen, 669,) the court held, in approval of the case of *Munn v. Commission Company*, (15 John. 44,) that in that case "the question was held to be, whether the holder, at the time of the negotiation of the note or bill, had such a right to it as to entitle him, if it was then due, to maintain an action upon it against the drawers and indorsers. If he could, then the discount of it at a higher rate than the legal interest, might be defensible as a purchase; but if he could not, then such discount would be illegal, as a usurious loan of money." And, in the same case, it was further held that a note made and indorsed for the purpose of a fair discount at bank, if discounted by another at an usurious rate, is void. The language of the court, at page 687, is: "A note has no binding force or legal inception, nor constitutes any contract, until delivered, and in the hands of a *bona fide holder*." It is not, therefore, essential, to make the note void for usury, that the intent to negotiate it at a usurious rate should exist at the time of its execution or delivery for the purpose of negotiation. A note without consideration, in the hands of a payee, is without a legal inception. A consideration is essential, in all cases, to support the validity of a bill or note, (*Story on Prom. Notes*, § 187,) and want or failure of consideration is a perfect defense to a note, as between the original parties; such a note is a *nude pact*. (*Pearson v. Pearson*, 7 John. 26. *Frisbee v. Hoffnagle*, 11 John. 50. *Slade v. Halsted*, 7 Cowen, 322.) The defendant claimed the right, at the trial, to go to the jury upon the question, as to whether the note was without consideration; and, as to this, the learned judge ruled, in substance, that if the note was without consideration, and the plaintiffs obtained it at a usurious discount, they could still recover. If it was without consideration, or had the jury so found, the position of the defendant would be like that of an accommodation maker of a note for the benefit of a payee, which, if discounted at a usurious rate of interest, would be void

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as against the maker for usury. (2 *Denio*, 621. *Powell v. Waters*, *supra*. *Williams v. Storm*, 2 *Duer*, 52. *Clark v. Sisson*, 22 *N. Y.* 312. *Hall v. Earnest*, 36 *Barb.* 585, 588.) The ignorance of the plaintiffs in regard to the origin of the paper, does not affect the question, or change its character. (*Hall v. Wilson*, 16 *Barb.* 548. *Powell v. Waters*, *supra*. *Dowe v. Schutt*, 2 *Denio*, 624. *Holmes v. Williams*, 10 *Paige*, 326.) That the defendant intended to put his note in circulation, and to give title to it to the payee, did not make it valid in his hands. If nothing was paid, no title could be acquired by the payee, and hence there was no legal inception. If negotiated by him upon a usurious consideration, the holder or transferee would take it subject to all the equities which properly attach thereto, between the antecedent parties. (*Story on Prom. Notes*, § 190.)

II. The note was obtained by fraud. It was, for the same reasons before stated, unavailable in the hands of the payee. If the infirmity of a want of consideration did not exist, the fraud would avoid the note as between the original parties, and as to all subsequent holders, if transferred by the payee at a usurious rate of interest. "A note which has been negotiated by the maker, and might, if at maturity, be enforced against him by the holder, may be sold at a greater discount than the rate of seven per cent per annum, without involving the purchaser in the penalties of usury; but the note must be perfect and available to the holder, to make it saleable by him. The test is the right to maintain an action upon it against the parties to it, if it were then due." (*Powell v. Waters*, *supra*. *Hall v. Wilson*, *supra*.) "To be the subject of such sale, it must have a preëxisting validity. Its breath of life cannot be imparted through a usurious transaction." (*Hall v. Everest*, *supra*.)

III. The plaintiffs were not holders in good faith; the note did not have a legal inception; the payee could not enforce its collection; it was obtained by the plaintiffs of

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the payee at a discount, or shave, of \$100, at a rate of interest equal to twenty-six per cent per annum. Neither the payee, nor his agent who conducted the negotiations for the transfer to the plaintiffs, known to them to be pecuniarily responsible, were required to indorse the note, or in any way to become liable for its payment. The transfer to the plaintiffs was not in the usual course of legitimate banking business. They did not, under such circumstances, become holders in good faith for a full and fair consideration, and are not entitled to the protection which the law gives to an innocent holder of negotiable paper, who, before maturity and for full value, receives it without notice of any defect in its inception. "To entitle the holder of negotiable securities, which have been obtained and put in circulation fraudulently, feloniously or without consideration to the benefit of this rule, he must have become such holder, in good faith, for a full and fair consideration, in the usual course of business, and without notice of the defect or infirmity in the title." (*Hall v. Wilson*, 16 Barb. 549, and cases there cited.) In *Bay v. Coddington*, (5 John. Ch. 54,) the court remarked: "I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it not only without notice, but in the usual course of business, and for a fair and valuable consideration given and allowed." This view is sustained in *Goldsmid, Pres't &c. v. Lewis Co. Bank*, (12 Barb. 410.) In *Miller v. Race*, (1 Burr. 459,) Lord Mansfield laid stress upon the fact that the holder came into possession of the bill for a full and valuable consideration, as well as in the usual course of business. This is the language also of later cases. It follows, therefore, that the holder of negotiable paper, obtained by fraud from the maker, must have given a full and valuable consideration, to be protected. Will it be pretended that to exact a dis-

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count of twenty-six per cent per annum, as in this case, is to pay a full and fair consideration? The good faith of the plaintiffs, as holders of the note, is impeached by the usurious character of the transaction through which they acquired title thereto. (*Ramsdell v. Morgan*, 16 Wend. 574. *Hall v. Wilson*, 16 Barb. 548. *Keutgen v. Parks*, 2 Sandf. 60.) *Ramsdell v. Morgan* was an advance of money at usurious interest, and the goods pledged. *Keutgen v. Parks* was not a sale, but a pledge of negotiable securities upon a loan at a usurious rate.

IV. The case of *Williams v. Tilt*, (36 N. Y. 319,) does not apply to commercial paper, although there is a *dictum* in the case seemingly in conflict with the case of *Ramsdell v. Morgan*, (16 Wend. 574,) before cited; it in fact only decides that a usurious agreement cannot be assailed by a stranger; that is, one not a party to it, nor claiming under the party injuriously affected by it. Certainly the maker of a promissory note, invalid for fraud, who is sought to be made liable for its payment, is privy to the contract. He is not a mere stranger, in any legal sense, to the act or agreement of transfer made by the party who committed the fraud, and which agreement would affect him injuriously. A surety is a borrower, within the meaning of the statute, and is entitled to avail himself of its provisions. (11 Wend. 329. 3 Paige, 528. 7 Hill, 393.) He is a party to the contract.

V. The defendant is not estopped from denying the *bona fide* holding of the plaintiffs, by reason of the former suit. To make the former suit a bar to the defense in this action, it should appear that the questions involved are between the same parties, or their privies. (*Doty v. Brown*, 4 N. Y. 70. *Goddard v. Benson*, 15 Abb. Pr. 191, and cases there cited.)

VI. It was error to refuse to instruct the jury and decide that the plaintiffs could only recover the amount they actually paid for the note. (*Cram v. Hendricks*, 7 Wend.

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569. *Mazuzan v. Mead*, 21 *Wend.* 285.) Equitably the defendant is at most a mere surety. As to him the note is a naked promise, without consideration. The payee negotiated it for his own benefit at a usurious rate of interest. Had it been a valid note, and had the payee indorsed it and been sued by an indorsee, while he could not have wholly defeated a recovery on the ground of having sold it at a greater discount than seven per cent, a recovery could have been had for the sum actually paid, with interest, and no more. A recovery for the full amount could be had of the maker in such case, because it would not lie in his mouth to say that the full value had not been paid by the indorsee, having himself received a full consideration. The limitation of the recovery by the indorsee against the indorser to the amount actually paid with interest is upon equitable principles, and upon still stronger equitable principles we insist that the recovery, if any can be had in this case, be limited in like manner.

Moore & McCartin, for the respondents.

I. The plaintiffs purchased the note in suit in the regular course of business, without any knowledge that the same had been obtained of the maker fraudulently, and are, therefore, *bona fide* holders. The term *bona fide* purchaser or holder, has reference to the standing of the holder or purchaser in respect to the original owner; that is, that he shall be free from any privity with the fraud, by having no part in it or notice of it, either actual or constructive, and where parting with value is proved, the amount of consideration paid is not otherwise important than as bearing on the question of actual or constructive notice. (*Gould v. Segee*, 5 *Duer*, 260. *Williams v. Tilt*, 36 *N. Y.* 319. *Steinhart v. Boker*, 34 *Barb.* 436.) 2. In the case of *Bay v. Coddington*, (5 *John. Ch.* 54,) the court held, that to entitle the holder of negotiable paper fraudulently transferred, to recover, he must receive it in the

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ordinary course of business, without notice of the fraud, and for a fair and valuable consideration given or allowed, and then says: "It is the credit given to the paper and consideration *bona fide* paid on receiving it, that entitles the holder on grounds of commercial policy to such extraordinary protection, even in cases of the most palpable fraud." There is no pretense in this case that the plaintiffs had any notice that the note in suit was obtained by fraud; but, on the contrary, the uncontradicted evidence in this case shows they purchased this note in the ordinary course of business, in good faith, of a responsible party, and paid at the time of the purchase a fair and valuable consideration. 3. The note in suit was not what is known as "bankable paper," it having seven months to run before due, and the fact that the plaintiffs purchased it at a discount of \$100, is not the slightest evidence of bad faith, as paper of this kind is the subject of sale at a discount, daily, in every city and town in the country.

II. This note was executed and delivered by the defendant to William B. Nicholson as an evidence of an existing debt, and for what he believed at the time was a good consideration, and the defendant thereby became liable to pay it to any one purchasing it. In *Van Duzer v. Howe*, (21 N. Y. 538,) Judge Denio in his opinion says: "The maker who by putting his paper in circulation has invited the public to receive it of any one having it in possession with apparent title, and he is estopped to urge the actual defect of title against a *bona fide* holder." 2. The object of the law is to secure the free and unembarrassed circulation of negotiable notes and bills of exchange, and the principle of protecting a *bona fide* holder of such paper who has paid value for it, is derived from and based upon a rule of equity. (*Vallett v. Parker*, 6 Wend. 615.)

III. The transaction in the purchase of this note, by the plaintiffs, of Spencer, was not usurious. To constitute usury, there must be, first, a loan; second, an intention to take

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more than seven per cent; and, third, the taking or securing a sum greater than at and after the rate of seven per cent per annum. In this case it cannot be claimed there was a loan, but a sale, and in all cases where the contract is in form one of sale or exchange, if the value secured to the vendor was in good faith, although inadequate, there can be no usury, whatever the price may be. (*The Dry Dock Bank v. American Life Ins. and Trust Co.*, 3 N. Y. 344.) The defendant relies on the case of *Hall v. Wilson*, (16 Barb. 548,) as authority that this transaction was usurious. In that case there was no delivery, but the note was stolen from the desk of the maker and sold to a broker at a large discount; and as a promissory note has no legal inception until it is delivered to some one as an evidence of a subsisting debt, the court held it had its inception when transferred by the thief to the broker at a discount, and was therefore void for usury. In the case at bar, the note was delivered by the defendant to Nicholson as an evidence of a subsisting debt, and the courts distinguish between paper that is feloniously and that fraudulently put in circulation. (*Saltus v. Everett*, 20 Wend. 267. *Brower v. Peabody*, 3 Kern. 126.) 2. The defendant was not a party to the transaction of the purchase of the note by the plaintiffs, and cannot allege usury to avoid its payment. A usurious agreement cannot be attacked by one not a party to it. (*Williams v. Tilt*, 36 N. Y. 319.)

IV. There is no force in the objection that the plaintiffs were only entitled to recover the amount paid and interest. That rule could only apply, if at all, as between these plaintiffs and Nicholson, and they are entitled to recover of the maker the amount of the note and interest.

V. The ruling of the justice at the circuit, directing the jury to find a verdict for the plaintiffs, for the amount of the note and interest, was correct. The plaintiffs having established the fact that they were *bona fide* holders, that entitled them to judgment, and it would have been error to

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have submitted to the jury the question whether the consideration of the note had failed or not.

TALCOTT, J. This was an action on a promissory note. The defense was that the note was obtained of Wilson, the maker, by the fraud of one Nicholson, the payee, and one Scott. The plaintiffs claimed to be *bona fide* holders, without notice, for value, which claim has been sustained by the verdict; but in reaching this result, two rulings were made by the court at the circuit, which were excepted to and are now claimed to have been erroneous. The note was for \$1000, with interest. It was purchased by the plaintiffs, who are bankers and brokers, before maturity, for the sum of \$900; and it is claimed by the defendant's counsel that if the note was obtained from the defendant by fraud, so that the payee could not have recovered upon it from the maker, then that the purchase of it for less than the face was usurious; so that the plaintiffs cannot be *bona fide* holders, but are in fact holders under a usurious and void contract. Without doubt there is some difficulty in reconciling the language of some of the cases with the proposition that the plaintiffs are entitled to recover. It has been held that a note made for the purpose of being discounted, if taken at a rate of discount greater than seven per cent *per annum*, by a party having no notice of the purpose for which the note was made, may nevertheless be attacked for usury. That a note made to be used in a certain manner, i. e., to be discounted at a certain bank, but diverted and sold at a discount greater than the legal interest, is usurious. (*Munn v. Commission Co.*, 15 *John.* 44. *Powell v. Waters*, 8 *Cowen*, 669, &c.) It is also claimed to have been decided that a stolen note sold to a party having no notice of any defect in the title, if sold at a deduction greater than lawful interest, is, for that reason, invalid in the hands of the holder. (*Hall v. Wilson*, 16 *Barb.* 548.) In this class of

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cases it is frequently said, as in the cases referred to, that the test is whether the note was valid in the hands of the payee so that he could have maintained an action upon it, and that if valid in this sense, it is valid in the hands of a *bona fide* purchaser, notwithstanding any defect in the title. There is no doubt, however, that a *bona fide* holder of commercial paper, for value, may recover, notwithstanding any defect in the title of the person from whom he derived it. Even though such person may have acquired it by fraud, theft or robbery. (*Story on Prom. Notes*, §§ 191, 192. *Hall v. Wilson, supra.*) It is claimed that a holder under a usurious contract cannot be a *bona fide* holder; and that the purchase for less than the amount purporting to be due upon the note on which the seller could not for any reason maintain an action against the maker, is usurious.

In the case of *Ramsdell v. Morgan*, (16 *Wend.* 574,) Mr. Justice Cowen says: "There is a solecism in the expression, 'a *bona fide* purchaser upon usury.'" But in that case the contract was clearly usurious. The defendant had not assumed to purchase the property, but had made an usurious loan upon the pledge and security of the property. The case of *Ramsdell v. Morgan* was followed in *Keutgen v. Parks*, (2 *Sandf. S. C.* 60;) but in that case, also, the contract was clearly usurious, and the commercial paper taken by the party who advanced the money was not purchased by him, but taken merely as a collateral security for the loan. Yet even these cases (*Ramsdell v. Morgan* and *Keutgen v. Parks*) are seriously questioned, and probably intended to be directly overruled in *Williams v. Tilt*, (36 *N. Y.* 319.) In the latter case it is held that "the term *bona fide* holder, or purchaser, has reference to the standing of the holder or purchaser in respect to the original owner; that is, he shall be free from any privity with the fraud by having no part in it or notice of it, either actual or constructive;" and that "the existence of usury in

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the contract between the fraudulent purchaser and his vendee, who, without notice of the fraud, makes advances on the property, does not affect the relative rights existing between him and the original owner." This late case, decided by the court of last resort, seems to determine the question presented in this case. That was a question, as in the case of *Ramedell v. Morgan*, as to what was necessary to constitute a *bona fide* holder of personal property which had been procured from the original owner by fraud; but the question is the same, or rather the position of the holder of commercial paper, *bona fide* and for value, is better than that of the holder of personal property; for such paper is valid, as we have seen, in the hands of such a holder, although stolen from the maker; whereas, a purchaser of personal property, however innocent, and whatever value he may have paid for it, acquires no title as against the original owner from whom it has been stolen. The fallacy of the argument of the appellant's counsel in this case is, that there can be no usury in the contract under which the plaintiffs claim to hold the note in suit. To constitute usury there must be a loan, direct or indirect, and an intention to reserve or take more than the lawful rate of interest on a loan. A note valid in the hands of the holder is property, which may be sold at any price. In this case, the note was offered for sale as a chattel, and was so sold and purchased, without indorsement. There was no intention, on the one side, of making a loan, or on the other, of borrowing money to be repaid. It may be said that this would be so in the case of a note made for the purpose of being discounted, but discounted at a greater rate than lawful interest, by a party ignorant of the true origin of the note; and that this was also the case in *Hall v. Wilson*, (*supra*.) But in such cases the note had not been delivered by the maker for the purpose of being put into circulation as a note. In *Hall v. Wilson*, the court say: "The mere act of signing the paper

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without a delivery of it, as evidence of a subsisting debt, did not make it the note of the signer." The same is true of notes made to be discounted. And herein may, perhaps, be found a distinction which may enable the purchaser, at less than the face, to recover in the one case and not in the other. In the one case, the note has not been issued and put in circulation as a valid note. In cases like the one at bar, the maker has intentionally issued the note and put it in circulation as a valid note, although induced to do so by the fraud of the payee. In support of the proposition that he who purchases at a discount greater than lawful interest, a note which has been obtained from the maker by fraud, cannot be a *bona fide* holder, reference is made to the language of the opinions in many cases, to the effect that, in order to be a *bona fide* purchaser, the purchase must be for a full and fair consideration.

Justice Allen, in the opinion in *Hall v. Wilson*, says: "Although not necessary to the decision of this case, there is ground for saying that the consideration must be full and fair as well as valuable." He apparently meant by this to suggest that, as a matter of law, the purchaser of a promissory note, in order to be protected against a defense existing as against the payee, must have paid the full face of the note. This appears to us to be erroneous in principle and a misconstruction of the meaning of the authorities. Of course, we concede that the purchase of a note for much less than its value is a circumstance to go to the jury on the question of the good faith of the purchaser, as a matter of fact. What is a full and fair consideration? Is it necessarily the face of the note? Is every man's note fairly worth the amount purporting to be secured by it? Manifestly not; and we apprehend the law can be guilty of no such absurdity as to declare peremptorily, that a purchaser has not paid a full and fair consideration for any note, who has not paid the face of it. Take the present case, for instance. The note in question

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was for \$1000, dated May 25, 1869, payable seven months after date. It was purchased by the plaintiffs, a few days after its date, for \$900. The plaintiff who proved the purchase was cross-examined by the counsel for the defendant, as to the circumstances of the defendant, his occupation, &c., and among other questions was asked, "You knew him [the defendant] to be a man of limited means, didn't you, sir?" This cross-examination was apparently for the purpose of showing that it was unnatural and unlikely that the plaintiffs would have paid so much as they did for the note, as a *bona fide* business transaction.

So manifest is it, as a matter of common sense, that all notes are not equally valuable *pro rata*, that the defendant sought to throw suspicion upon the transfer in this case, by showing that the plaintiffs had paid more than the reasonable value of the note in the market. We think the price paid on the purchase of the note may go to the jury on the question of good faith, but that it cannot as a matter of law be held to impeach the title of the holder, who is otherwise a purchaser in good faith, for value, and without notice.

The other exception is to the ruling of the judge, that the plaintiffs were entitled to recover the full face of the note, with interest, and were not limited to a recovery of the amount they had paid for the note, with interest. This presents the question whether the holder of a note in good faith, for value, which has been obtained from the maker by fraud, is entitled, as against that maker, to be protected beyond his advances, with interest. That question we have decided at this term, upon an examination of the authorities. (*Huff v. Wagner.*) (a) A majority of the court think the *bona fide* holder of a note thus fraudulently obtained, has no equity as against the party defrauded, beyond the amount of the advances he has made upon the faith of the note. That protection, to

(a) Ante, p. 215.

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this extent is all that justice or the policy of the law requires. If we are correct in this holding, then the court below erred in the ruling referred to, and the judgment should be reversed and a new trial ordered, unless the plaintiffs stipulate to deduct from their verdict the sum of \$100, with interest from the date of the transfer of the note; in which case the judgment must be affirmed, with costs of the appeal to neither party.

JOHNSON, J., concurred.

MULLIN, P. J. I think the plaintiffs were entitled to recover the whole amount of the note, under the case of the *Park Bank v. Watson*, (42 N. Y. 490.) That case, it seems to me, reverses all the cases on which my brother TALCOTT relies.

Judgment reversed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Mullin, Johnson and Talcott*, Justices.]

HUTCHINS vs. SMITH and others.

To maintain an action to abate a nuisance, since the remedy is by action and not by writ, the plaintiff must allege that he was the owner of the freehold affected by the nuisance, at the time when the several acts complained of were committed; and the action must be against the owners in fee, in cases where it is brought to abate the nuisance.

Since the Code, a party injured by a nuisance created or continued by another, has a right to come into a court of equity and ask for relief by a perpetual injunction restraining the defendants from so using their property as to annoy him and prevent the enjoyment of his premises, and for damages, as incidental to such equitable relief.

Where defendants have a right to have the issues in the action tried by a jury, if they choose to have the same settled under the rule, but instead of this, the issues are brought to a hearing before the court, without objection, the

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67h	307
63	251
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defendants will be held to have waived a trial by jury; and the findings of the court are to stand in the place of a verdict of a jury.

And if, in an action for a nuisance, the court reaches the conclusion that the plaintiff's rights have been invaded by the acts of the defendants, so that they have been guilty of maintaining a nuisance, the plaintiff will be entitled to "judgment for damages, or for removal of the nuisance, or both."

Where, by the erection and use of lime kilns by the defendants, upon their own premises, in close proximity to the residence of the plaintiff, the plaintiff's premises were, by reason of the smoke, gas and dust issuing from the kilns, rendered unfit for a comfortable habitation, and the smoke and gas, when inhaled by persons of sensitive lungs, were alike unpleasant and uncomfortable, as well as, to some extent, detrimental to health; *it was held* that the plaintiff was entitled to enjoy his premises free from the presence of the smoke, gas and dust proceeding from the kilns; and that the defendants had no right thus to pollute the air and disturb the comfortable occupation and enjoyment of his premises by the plaintiff; and that their doing so, amounted to a nuisance.

Held, also, that the plaintiff was entitled to a perpetual injunction to restrain the continuance of the nuisance caused by operating the lime kilns, to his annoyance or injury; and to damages for past injuries.

THIS is an action to recover damages and for an injunction to restrain the continuance of an alleged nuisance, caused by operating lime kilns in Fayetteville.

B. F. Chapman and C. B. Sedgwick, for the plaintiff.

S. D. Luce and D. Pratt, for the defendants.

HARDIN, J. To maintain an action to abate a nuisance, since the remedy is by action and not by writ, the plaintiff must allege that he was the owner of the freehold affected by the nuisance at the time when the several acts complained of were committed; and the action must be against the owners in fee, in cases where it is brought to abate the nuisance. (1 *N. Y.* 223. 5 *Barb.* 550. 16 *id.* 568. 24 *id.* 404. 29 *id.* 391. 12 *N. Y.* 486.) By section 453 of the Code, the writ of nuisance is abolished, and by section 454 it is provided that "injuries heretofore remediable by writ of nuisance are *subjects of action*, as other

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injuries, and in such action there may be judgment for damages, or for the removal of the nuisance, or both."

The plaintiff in this action seeks to recover damages for past injuries, and the complaint also asks for a perpetual injunction restraining the defendants from so using their lime kilns as to annoy him, and prevent the enjoyment of his premises.

It is now well settled that the plaintiff has a right to come into a court of equity and ask for such relief, together with his damages as incidental to his equitable relief.

"Although he had a remedy at law for the trespass, yet as it was of a continuous nature, he had a right to come into a court of equity and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief." (*Williams v. N. Y. Central R. R. Co.*, 16 N. Y. 111.) In *Davis v. Lamberton*, (56 Barb. 480,) the general term in this district passed upon this question, and the opinion of Justice FOSTER very ably maintains the right to the double relief in one action, and reaches the conclusion that such an action is one in equity.

It has been insisted by the learned counsel for the defendants, that "this is not a clear case, upon the proofs, in respect to the nuisance, and therefore it should be tried before a jury, and this complaint, for that reason, should be dismissed."

Numerous cases are found in the books, where a court of equity has refused to grant a preliminary injunction in doubtful cases, until a trial had been had before a jury; and it may be conceded that before the adoption of the Code that was the general rule. (3 *John. Ch.* 282. 16 *Ves.* 338. 6 *Paige*, 563. 11 *Hump.* 403. 1 *Cooper*, 343. 6 *Barb.* 152. 37 *N. Y.* 99. 56 *Barb.* 480.)

But the question presented here is not whether a preliminary injunction should issue, but on the contrary, whether a permanent one shall be granted, in conjunction

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with the findings and decision upon the facts relied upon to entitle the plaintiff to damages.

In this case the defendants might have had the issues tried by a jury; had they chosen to have the same settled under the rule. They have been voluntarily brought to a hearing before the court, and the findings of the court are to stand in place of a verdict of a jury, (4 *Rob.* 451; 56 *Barb.* 485;) and the defendants must be held to have waived a trial by jury, (34 *N. Y.* 30; 40 *id.* 504; 40 *How.* 160;) and in case the court reaches the conclusion that the plaintiff's rights have been invaded by the acts of the defendants, so that they have been guilty of maintaining a nuisance, the plaintiff will be entitled to "judgment for damages or for removal of the nuisance, or both." (*Code*, 454.)

The important question in this case, upon the proofs, and to be determined by the court, comes to this; have the defendants, by erecting their lime kilns 204 feet from the dwelling-house of the plaintiff, and there operating them for the purpose of burning stone into lime, by fire made of coal-dust and wood, and allowing the dust, gas and smoke therefrom to come upon, and into, the premises and house of the plaintiff, caused such an interference with the plaintiff's enjoyment of, and such an injury to, his property, as amounts to a nuisance.

The authorities bearing upon this question are very numerous, and an examination of some of them may not be inopportune. In *Bamford v. Lumley*, (4 *Com. Bench*, *N. S.*, 334,) it was held that in the case of a brick kiln, where it was not proved that it was at an improper location, the party was not liable, although the plaintiff's property was directly injured, and his trees and shrubbery killed and destroyed. But in a later case this rule was very considerably modified. In *Tipping v. St. Helen's Smelting Co.*, (11 *House of Lords Rep.* 642,) the lord chancellor held that the rule, as above laid down in *Bamford*

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v. *Lumley*, only applied to cases of simple *annoyance*, and not to the cases where the property was materially injured. This rule, as modified, was substantially stated and asserted by the chancellor, in this State, in his opinion in *Catlin v. Valentine*, (9 *Paige*, 575,) in these words: "To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which renders the *enjoyment of life* and property uncomfortable."

The chancellor's conclusion was approved in *Brady v. Weeks*, (3 *Barb.* 159,) by *Paige, J.*, in which it was also held that a slaughter-house in a city is, *prima facie*, a nuisance to persons residing in the neighborhood.

In *Hay v. Cohoes Co.*, (2 *N. Y.* 161,) *Gardiner, J.*, says: "The use of land by the proprietors is not therefore an absolute right, but qualified and limited by the *higher right of others* to the lawful possession of their property. To this possession the law prohibits *all direct injury, without regard to its extent*, or the motives of the aggressor. A man may prosecute such business as he chooses, upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of *lawful trade*."

It was held in *Carhart v. Auburn Gas Light Co.*, (22 *Barb.* 297,) that the use of land for gas works was not within the usual and ordinary purposes to which real estate is applied, and that whenever the works cause any special injury, they are to be regarded as a private nuisance; and that an action will lie in favor of any person sustaining special injury.

In *Fish v. Dodge*, (4 *Denio*, 311,) Judge Bronson very clearly states the rule, and fortifies his statement with numerous cases; and his language, at page 316, is not inapplicable here. He says: "There are many cases in the books where this doctrine has been applied; and among the number are those where a man erects a smith's forge, swine-sty, *lime kiln*, privy or tallow furnace, *so near*

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the dwelling-house of another as to render it unfit for habitation. It is not necessary to a right of action, that the owner should have been *driven from* his dwelling; it is enough that the enjoyment of *life and property* has been *rendered uncomfortable*."

The defendant's counsel has cited to the court the case of *Doellner v. Tynan*, (38 *How. Pr.* 176,) which was tried at a special term of the superior court, in the city of New York, and the opinion delivered by Monell, J.

That was a case in respect to a blacksmith shop in the city, and it was clear, upon the evidence, that the value of the plaintiff's property was not materially affected by the defendant's business, and the court came to the conclusion that the *street in question had been substantially abandoned to business purposes*.

After quoting the general rule, as already stated, the learned judge added, that "the general doctrine has been applied to a variety of businesses, which were lawful in themselves, but which rendered the residences of others unfit for *comfortable* habitations, such as a smith's forge, (*Bisby v. Gill*, *Lutw.* 69,) swine-sty, (*Alfred's case*, 9 *Reps.* 59, a,) lime kiln, (*Id.*, *per Gray*, *Ch. J.*), and tallow furnace."

The same learned judge quotes 4 *Robertson*, 449, with other cases, approvingly, and adds, at page 181 of his opinion, that, "From these cases, which have been cited, and many others, which might be, it appears to be well established that any lawful business or trade may be a nuisance, if it is conducted in a manner which is injurious to the *comfortable* enjoyment of another man's property. It need *not be detrimental* to health, or endanger life; nor is it necessary that it should directly depreciate the value of the property. If in the manner and for the purposes such property may be used, its enjoyment is so interfered with as to destroy or *greatly impair its comfortable use*, it is a nuisance against which the law will protect the injured."

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In the case of *The Manhattan Gas Light Co. v. Barker*, (36 *How. Pr.* 238,) the court affirms that, "If a public nuisance work a private injury to a person, that person may have a remedy by a private action for damages, and, in a proper case, may have an injunction. A noisome odor, issuing from a public nuisance, such as issues from the plaintiffs' gas works, will have this effect, if it *pervades the surrounding atmosphere, enters the adjacent dwellings*, and either endangers the health or *disturbs the comfort of those dwelling therein.*"

Judge Willard, in his able work on *Equity Jurisprudence*, lays down substantially the same rule as many of the preceding cases. He says, at 389: "It is not necessary to constitute a nuisance that the smell created by it is injurious to health. If there be smells *offensive to the senses*, that is enough, as the neighborhood has a right to fresh and pure air. Nor will the presence of other nuisances justify any one of them."

There is ample authority to establish the right of a plaintiff to maintain a suit in which he may both recover damages for a nuisance, and remove it by the aid of the law. (37 *Barb.* 301. 3 *Sandf.* 282. 46 *Barb.* 568, 569. 56 *id.* 480.)

It appears by the proofs, that the defendants, in the winter of 1870 and 1871, erected the two lime kilns across the road from the plaintiff's dwelling-house, near the village of Fayetteville, and about forty feet from the highway, and distant from the plaintiff's house 204 feet; and that in the summer of 1871 the defendants commenced and continued to use the same. The plaintiff's house is surrounded, to some considerable extent, with fruit and ornamental trees; that his house is one which has been kept up quite fairly, and occupied by himself and his sister, and their father and mother, for quite a number of years; and that the house and lot, consisting of about two and a half acres, are worth in the neighborhood of \$4500. The

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defendants' kilns are so constructed that the diameter of each, at the top, is about seventeen feet, and the top is about sixteen feet below the water-table of the plaintiff's house. Each kiln, when filled, takes about fourteen tons of anthracite coal-siftings, and a quantity of wood, intermingled with the stones; and that it requires about two days to "fire it up." During the first part of the burning, there escapes from the top of the kiln a dense black smoke, *more or less filled with gas, particles of dust, and the smoke at times, when the wind is in the northwest, is driven upon the plaintiff's premises, and into and upon his dwelling, rendering the air very disagreeable, and unpleasant to breathe.*

Numerous witnesses say the smoke is unwholesome and injurious to persons inhaling it, and those of the plaintiff's family whose lungs are weak and sensitive, testify that they experience injurious effects from inhaling it; that it produces pain in the eyes and head. Some of them testify that the dust from the smoke settles upon the furniture and upon the cream of the milk, to such an extent as to be very annoying and unpleasant.

In the absence of the northwest wind, the smoke was not driven upon the plaintiff's premises; nor is the air affected to any considerable extent thereby, upon the plaintiff's premises. I cannot resist the conclusion that within the authorities already cited, by the use of the defendants' lime kilns, in the manner described by the witnesses, the effects are produced which render the air more or less impure when filled with the smoke and gas escaping upon the plaintiff's premises and into his dwelling; that the air is rendered unwholesome and disagreeable, and unpleasant to inhale. In other words, the plaintiff's premises are rendered unfit for a comfortable habitation, and, to persons of sensitive lungs, the smoke and gas, when inhaled, are alike unpleasant and uncomfortable, as well as to some extent detrimental to health.

It appeared that the gas taken into the lungs of work-

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men, near the top of the kilns, sometimes produced nausea and vomiting; and these effects, in a much milder degree, seem to be produced upon persons of sensitive constitutions, who inhale the smoke and gas at the distance of the plaintiff's dwelling from the kilns.

The plaintiff is entitled to enjoy his premises free from the presence of the smoke, gas, and dust proceeding from the defendants' kiln, and the defendants have no right thus to pollute the air and disturb the comfortable habitation of, and the enjoyment of the plaintiff's premises.

The defendants' learned counsel insists that the plaintiff caused the location of the lime kilns at the point where they were erected, but the evidence seems to require a finding that the most that he did, in that respect, was to inform the defendants, that if they were determined to locate in the lot named, the point selected would be most satisfactory.

But such information cannot be held to be an irrevocable license to keep up the nuisance to the annoyance and injury of the plaintiff. (*Bingham on Real Property*, p. 100. 1 *Keyes*, 115. 29 *N. Y.* 634.) The proof shows that the plaintiff notified the defendants as early as the 7th of January, 1871, that if they built the kilns where they are now located, the plaintiff would prosecute the defendants.

The plaintiff demands, in his prayer, an injunction restraining the defendants "from further running, operating or using said lime kilns." The language is too broad. The kilns are harmless; it is the use of them, in the manner mentioned, which is to be restrained. Possibly they may be used in such a way as not to interfere with the plaintiff's rights. (4 *Rob.* 473. 46 *Barb.* 666. 56 *id.* 480, and cases cited.)

Judgment for the plaintiff.

[ONONDAGA SPECIAL TERM, April 28, 1872. *Hardin*, Justice.]

DUNCAN S. WALKER *vs.* THE ERIE RAILWAY COMPANY.

The object of the law being to fairly compensate a party injured through the negligence of another, for the entire loss directly caused by the injury, the pecuniary consequences resulting from such party's inability to give his business his attention forms a proper item of the remuneration to be made.

Where a train of cars upon the defendant's railway, in which the plaintiff was a passenger, was met by a construction train coming from the opposite direction, which had upon it a bar of iron projecting five or six feet, in a slanting direction, so that it would necessarily run into anything it came against, and such bar struck the car in which the plaintiff was sitting, and injured him; *Held* that in the absence of everything tending to explain or show how the iron bar was placed in the position that produced the injury, the inference was plain that the injury resulted from the inattention and negligence of the persons having the control and management of the construction train.

Held, also, that such inattention and negligence was a violation of the obligation existing between the defendant as a carrier, and the plaintiff as a passenger, which, by its contract, the defendant had assumed to perform; viz. to observe the highest degree of skill, care and attention in his carriage and transportation. And that was sufficient to entitle the plaintiff to recover damages for the injury sustained.

In actions to recover damages for personal injuries occasioned by negligence, no precise rule exists by which the extent of the recovery can be prescribed. For the compensation to be received is, to a great extent, to be awarded for pain and suffering which cannot be accurately measured by amounts.

The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied where the injury is to the person; injuries of that character being without precise pecuniary measure.

The law has accordingly, in that class of cases, committed the determination of the amount of damages to be awarded, to the experience and good sense of jurors. And when the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment on their part, the policy of the courts is, and necessarily must be, not to interfere with their conclusion.

Where injuries sustained by the plaintiff through the negligence of the defendant—a carrier of passengers—were of an exceedingly painful, serious and permanent nature, some of the important effects of which would probably continue during his natural life, and might sensibly abridge the period to which it might otherwise have been extended; and the plaintiff was in his early manhood, and engaged in an extensive and lucrative business, which was impaired by his inability to give it the requisite attention, since his

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injury, and he was afflicted with bodily derangements that might measurably unfit him for the duties of his profession ; *Held* that under these circumstances, the court had no data from which it could say that a verdict for the plaintiff for \$20,000, was greater than the compensation he should justly receive.

Where a statement of a witness is simply objected to, in general terms, at the trial, it cannot be urged, on appeal, that it was inadmissible because it was the *opinion* of the witness. If the ground of the objection is not stated, at the trial, it will be deemed to have been waived.

THIS action was brought to recover damages for injuries sustained by the plaintiff as a passenger on the defendant's railway, on the 8th of March, 1869. At the time of the injury the plaintiff was in the smoking car, the first passenger car in the train, and the train was moving at the rate of about thirty miles an hour, on its way between Port Jervis and the city of New York, proceeding to the place last named. As this train passed a curve, a construction train in the employment of the defendant was discovered by the engineer moving in the opposite direction. And upon that train a railroad bar of iron projected from the platform car constituting a portion of the construction train. The engineer testified that he thought it projected something like five or six feet. It was in a slanting direction, so that it would necessarily run into anything it came against. It kind of jarred, stopped the headway of the train considerably; he heard something crash; upon stopping his train and examining the cars, he found the side of the smoking car torn out, between the front and middle part. At Sufferns he testified that he went back and examined the cars; the first passenger car was broken in, and the seats all torn out; the sides were split open, and the seats were scattered all over the car. By the other evidence in the case it was shown that the plaintiff was in the portion of the car which was broken, and received his injuries at the same time and by the same means. Evidence was also given tending to show the nature and extent of his inju-

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ries; his sufferings following it; his position, business and probable loss in consequence of it. The jury rendered a verdict in his favor, for \$20,000. A motion for a new trial was afterwards made by the defendant, and upon that being denied, the defendant appealed from the order denying it, and also from the judgment entered upon the verdict, to the general term.

S. Newell, for the appellant.

H. Brodhead, for the respondent.

By the Court, DANIELS, J. The injuries received by the plaintiff, as well as their actual and probable consequences, were described by him in the testimony he gave as a witness upon the trial, and by the physicians who attended and treated him for them. From his own evidence, which, in the absence of anything in the case contradicting it, the jury certainly had the right to believe, it appeared that he had previously been in a state of complete health. That he was so far injured as to lose his consciousness for the time, and when he recovered it, found the blood streaming from his mouth and nose; feeling nothing but a dim consciousness that some terrible calamity had happened. In a weak condition he was led into the next car. At first he felt scarcely any pain, but weak and sick at the stomach, with great numbness about the head and limbs. His brain, he said, was evidently numbed, and sensibility deadened by the blows, and concussion. He was removed from the cars at Paterson. And after that he stated that the lower limbs, beginning at the back, down to the knees, felt stiff. Also that there was contusion upon the right leg near the thigh; on the left leg, above the knee; upon the right side of the body just above the hip, and well towards the back, about an inch above the right temple; and also one upon the left side of the nose; and his lip

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was cut through near the middle, and extending back to the rear of the upper row of the teeth on the left side. The whole of the left portion inside the mouth was lacerated and swollen; the upper front teeth broken off, two near the base, the others in the jaw. The molar tooth on the left entirely smashed out; and the upper molar on the right side had a piece broken off; a contusion about the center of the left jaw; the jaws stiff, and the face on the left side much swollen. The pain in the mouth and face became intense; he felt confused, as if sinking rapidly, and thought he should die before the physician came. At night, he testified, that he lay awake in great agony; for three weeks he suffered the same from the lacerations of his mouth, pain in the head, face and jaw, with all his teeth very sensitive, and his lower limbs, at times, stiff and very uncomfortable. In the following October his whole face became swollen, giving him intense pain for two days and nights. In June, 1869, he had a severe attack of the kidneys, from which he suffered great agony, and to allay it was obliged to take chloroform. In May, before, and October, January and March, afterwards, he experienced similar attacks. A nervous disease of the kidneys, he testified, had occurred, since the accident. He stated, that he had suffered much, at times, from severe headaches, to which, before that, he had not been accustomed; and if he sat still any length of time, there was numbness and an unpleasant sensation, beginning in the lower parts of the back, and extending down the limbs to a point above the knees. He also testified that he was by profession a lawyer, and could not undergo the same amount of work as formerly without some immediate injurious result; that he could not sustain the same amount of fatigue; that his capacity to enjoy life had been to a great extent affected by these injuries, and his constitution had been weakened by them; before the accident he walked great distances without fatigue, but at the time

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when his evidence was taken, May 20, 1870, if he walked far his limbs became stiff and numb; that he had previously been accustomed to sleep soundly, but since then he did not sleep soundly nor well. He had also become subject to attacks of rush of blood to the head, producing dizziness, which never occurred before, except upon some unusually violent exertion; and to great depression of spirits, produced by his nervous condition; the distinctness of his articulation was for a long time seriously affected, and still remained materially affected; and by his absence from his business it had become generally impaired.

Dr. William H. Van Buren, who was called upon to attend the plaintiff professionally, soon after the injuries were received, corroborates the plaintiff's description of them, by his evidence. He added that he could not say, that all the evil consequences to the plaintiff's system, of these injuries, had, to a certainty, fully developed themselves when he last saw him. That in cases of railroad injury, he constantly saw persons who traced back the source of existing disease to injuries received by railroad accidents, and properly did so; that he did the same. That the character of the injury showed that the plaintiff had evidently been in imminent peril of his life. He also added, that these injuries were exceedingly and unusually painful; that they would have a tendency to weaken the plaintiff's constitution, invite disease, and impair his capacity to enjoy life. He thought the brain had been injured to the extent of a recent concussion. The plaintiff was confined to the hotel in New York, to which he was removed from Paterson, for the period of about two weeks.

Another physician, who was called upon professionally by the plaintiff, August 1870, testified that he then complained of fixed pain at the junction of the spinal column and the hip, radiating down both legs, but particularly the left thigh and leg, and of numbness in that limb; and

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that there was a perceptible drag of the whole of that limb. He also complained of inability to pursue any long continued train of thought; of fullness and tension in the head; of headache, restlessness and bad dreams. The witness considered these effects the symptoms of what is known as paresis, or enfeeblement of the spinal cord, the result, in many cases, of concussion of the spinal cord, or brain, as the one or the other might exist. This trouble, he stated, with the back and limbs, has continued with alternations of better and worse. He always seemed conscious of the existence of pain. The witness deemed them the result of the accident, and stated that they were the precursors of more decided paralytic symptoms. He thought there was danger of paralysis, but hoped to avert it; and that that disease might result from an affection of the spinal cord; that there was no necessity for a direct blow to the spine to produce such a result. A person might have a concussion, not at first appearing serious, proving at last to be permanent and serious. The kidney derangements, he stated, further, were always traceable to nervous disorders.

In addition to this evidence relating to the plaintiff's condition, he himself testified that he was at the time, a partner with his father, the late Hon. Robert J. Walker, in the practice of the law, at the city of Washington. That their business was extended and lucrative, yielding them a cash income for the previous year, of \$37,000, of which his share was one half. This evidence was objected to by the defendant, and received, subject to the exception of its counsel. But when it is remembered that the object of the law is to fairly compensate the party injured, for the entire loss directly caused by the injury, it becomes apparent at once, that the pecuniary consequences resulting from his inability to give his business his attention, will form a proper item of the remuneration to be made. And that is plainly warranted by the authorities upon the subject.

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(*Lincoln v. Saratoga and Schenectady R. R. Co.*, 23 Wend. 425. *Wade v. Leroy*, 20 How. U. S. 34. *Nebraska City v. Campbell*, 2 Black. 590. *McIntyre v. N. Y. Cent. R. R.* 37 N. Y. 287.)

Under the evidence referred to, as to the manner in which the injury was occasioned, and in the entire absence of everything tending to explain, or show how the iron bar upon the construction train was placed in the position that produced it, the inference is a plain one, that it resulted from the negligence of the persons in the control and management of that train. It could have been, and such articles usually are, carried differently, and in such a manner as not to be the cause of danger or harm to the other trains liable to be met upon the other track of the railway, and the omission to carry it safely, in the absence of all explanation tending to exculpate the persons having control of it, from the charge of negligence and inattention to their duties, necessarily leads to the conclusion that such inattention and negligence existed in the case. (*Bowen v. N. Y. Cent. R. R.* 18 N. Y. 408. *Edgerton v. N. Y. and Harlem R. R. Co.*, 39 id. 227.)

And it violated the obligation existing between the defendant as a carrier, and the plaintiff as a passenger, which, by its contract, the defendant had assumed to perform; to observe the highest degree of skill, care and attention in his carriage and transportation. (*Hegeman v. Western Railroad*, 3 Kern. 9. *Brown v. N. Y. Cent. R. R.* 34 N. Y. 404. *Maverick v. Eighth Avenue R. R. Co.*, 36 id. 378.) And that, under the circumstances, presented a case on which the plaintiff was entitled to recover.

The defendant's counsel, however, contends that the recovery in the action was excessive. In this class of cases no precise rule exists, by which the extent of the recovery can be prescribed; for the compensation to be received is, to a great extent, to be awarded for pain and suffering which cannot be accurately measured by amounts. (*Ran-*

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son v. N. Y. and Erie Railway Co., 15 N. Y. 415.) The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied where the injury is to the person; for those injuries are without precise pecuniary measure. The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them, may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the courts is, and necessarily must be, not to interfere with their conclusion. (*Wightman v. City of Providence*, 1 Cliff. 524. *Caldwell v. New Jersey Steamboat Co.*, 56 Barb. 425.)

The injuries sustained by the plaintiff, as they have already been shown, from the evidence, in the view in which the jury were at liberty to accept it, were of an exceedingly painful, serious and permanent nature, some of the important effects of which it is probable will continue during his natural life, and may sensibly abridge the period to which that might otherwise have been extended. He was of the age of twenty-eight years, in his early manhood, engaged in an extended and lucrative practice of the law, impaired by his inability to give it the attention which it required, and attended with bodily derangements that may measurably unfit him for the duties of its pursuit. Under the circumstances which the evidence tended to establish, the court has no data from which it can say that the verdict rendered by the jury was greater than the compensation the plaintiff justly should receive. If they believed, as they may be assumed to have done, that all the consequences mentioned by the medical witnesses, and indicated by the testimony given by the plaintiff, would probably result from the injury he has been subjected to, then the verdict was not too large. And this court should not set it aside; which is the only mode in which it could,

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in any case like the present one, be at liberty to interfere with it. (*Cassin v. Delany*, 38 N. Y. 178.)

Objections were taken, during the trial, to certain statements of the plaintiff as a witness, allowed to be given by the court. By the first, now relied upon, he answered that the brain was evidently numbed, and sensibility deadened by the blows and concussion. This statement was simply objected to in general terms, but it is now urged that it was inadmissible because it was the opinion of the witness. That, however, cannot properly be held to be its nature; for the witness was describing the effects produced by the injury upon his feelings, and this was most likely designed to be of the same character. But if it was not, the objection now urged should have been presented to the attention of the court at the trial. If it had been, and the answer was deemed the statement of an opinion, as distinguished from the relation of a fact, it would, no doubt, have been then excluded as improper. The omission to present that point then, must be held to be a waiver of it now. (*Fountain v. Pettee*, 38 N. Y. 184-186.)

A similar form of objection was made to the evidence showing the kidney difficulties experienced by the plaintiff after the accident. But as he was free from bodily derangement before the injury, and it was shown that these derangements were traceable to nervous disorders, or as the plaintiff testified, a nervous disease of the kidneys occurred, and the plaintiff's nervous system suffered from the injury received, there was sufficient probability for insisting that these attacks were caused by it, to render the question whether they were or were not the proper subject of consideration by the jury. This seems to be one of the derangements Doctor Dimkerd treated him for; and he swore that what he treated him for was entirely due to the accident. For these reasons, this evidence was admissible, but if it had not been, the objection was too general to bring it in question upon this appeal.

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The same answers may, with equal propriety, be given to the objection taken to the evidence that the plaintiff had not been sick to exceed a day at a time, and from trivial causes, since 1864, and then only with army fever, from which he completely recovered. It had some tendency to confirm the statement made by himself, and by Doctor Van Buren, that he was in perfect health at the time of the accident.

The objection to the statement that the plaintiff was in partnership with his father, may be dismissed with the remark, that if it was entirely immaterial that objection was not taken to it, but one simply of the most general form, it was properly received as an incident of the business relations of the plaintiff, and as introductory to the evidence of the illness of his partner, for which reason he could not be expected to discharge the plaintiff's duties in their joint business.

The defendant requested that the court should charge the jury that if the defendant, or its agents, had no knowledge, or reasonable means of knowledge, of the rail projecting from the car, in season to remove it before the accident, the plaintiff could not recover. This was properly denied, for the reason that no evidence was given in the course of the trial tending to show that no such knowledge, or means of knowledge, existed. The facts indicated the contrary. If a due degree of attention had been bestowed upon the construction train, the state of the rail upon the platform car would have been discovered at once, and the accident probably avoided. Then the answer which the court, at the trial, gave to the proposition was entirely apposite and reasonable; that was, that the rail might have been so carelessly placed upon the car as to slip into an improper position by the movement of the train. Certainly, human foresight, properly directed, was capable of guarding against the result which followed.

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And if it could have done so, the defendant was liable for the omission.

The refusal to charge that there was no evidence before the jury that the plaintiff was not earning as much money since, as before the accident, was not error. The court charged that there was no direct evidence to that effect. But circumstances were shown by the medical witnesses sworn for the plaintiff, and by his own testimony, tending to show that his business capacity had been diminished, and from that it might well be inferred that his earnings were reduced by means of the accident.

Upon this subject, the plaintiff testified that his powers of application to business, and for continued thought, had been diminished; and that his business had been impaired by its want of attention. Doctor Van Buren said that the injuries would have a tendency to weaken his constitution, to invite disease; impair his capacity to enjoy life; and that nothing could put him where he was before; which, according to this witness, was a state of perfect health. The evidence of Doctor Dimkerd was, in substance, to the same effect. And the plaintiff, in this connection, also testified that he could not undergo the same amount of work as formerly, without some immediate injurious results.

No ground exists for interfering with the disposition which has been made of the case; and the order and judgment should accordingly be affirmed, with costs.

[THIRD DEPARTMENT, GENERAL TERM, at Schenectady, June 4, 1872.
P. Potter, Parker and Daniels, Justices.]

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A guardian in socage has the right to make a lease of the lands of his ward, in his own name; and one so made will bind the infant as effectually as if made in his name.

A general guardian has, as such, the same power, in that respect, as a guardian in socage.

For injuries to the premises covered by the covenants in a lease, the minor, as owner in fee, has no right of action, except upon the lease itself. Only one action can be maintained, for such injuries, and that action must be on the lease.

A lease executed by a guardian, of his ward's land, is assignable; and the assignee can recover damages for breaches of all covenants therein which may be assigned; provided he is also owner of the reversion. This embraces covenants by a lessee to work the farm in a good farmer like manner, to keep it in good condition, to seed down a part, &c. &c. *MORGAN, J.*, dissented.

The contract of a guardian for the *sale* of his ward's real estate is wholly unauthorized, and will not bind either the ward or his estate; except so far as the guardian has the power to deal with the possession.

If a lease executed by a guardian does not cover the whole period of the ward's minority, then there is a reversionary interest in the guardian, which he has a right to assign.

Such interest will pass under a contract of sale, executed by the guardian and approved by the court; and the purchaser will have such a reversionary interest in the premises as will enable him to recover damages for an injury to such interest.

Although the assignee of a lease, only, cannot recover for injuries to the reversion, yet where such assignee is also the owner of the reversion, he may recover for such injuries.

A PPEAL, by the plaintiff, from a judgment of nonsuit ordered at the circuit.

The action was brought to recover damages for the breach of a contract by the defendant, in not working and conducting a farm according to an agreement or lease set out in the complaint. The answer set up, 1st. A general denial. 2d. That the farm &c. leased, belonged to one Henry N. Adams, an infant, and that he was the owner in fee thereof, and that said lease was made without any legal right on the part of the lessor to make the same. That the violation of said lease consisted of injuries to the

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freehold and accrued to said infant, and that he had not, in any way, assigned the claim for such damages to the plaintiff. That at the time the defendant took said lease &c., he supposed said lessor had a right to give the same. 3d. That the defendant plowed only as good husbandry required, and offered to seed down the same as was needful. But the lessor neglected and refused to furnish the seed, and that the defendant afterwards settled all damages with said lessor, and seeded said farm according to his agreement in said lease. And that all timber cut or carried off from said farm was by consent and direction of said lessor, and accounted for by the defendant before the assignment of said lease to the plaintiff. That no wood was cut from said land except what was necessary for the defendant's family, and such as was authorized by said lease.

On the trial, the defendant's counsel offered to prove that said Henry N. Adams was the only child and heir at law of Norton Adams, deceased, and that he inherited the said land in fee from his father, free and clear of incumbrance, except the unassigned right of dower in his mother, the lessor, who was his general guardian, and that the defendant's occupancy of the farm, under said lease, was terminated in pursuance of notice previously given, according to the requirements of said lease, April 1, 1860, and that the plaintiff then went into possession of said farm. Each and every part and parcel of the evidence offered by the defendant was duly objected to by the plaintiff's counsel, upon the ground that the defendant was estopped from denying or disputing the title of his lessor; which objection was overruled, and the plaintiff's counsel duly excepted, and the evidence so offered was received. The plaintiff's counsel, on being requested by the defendant's counsel, admitted that he did not expect to prove any injury to the personal property, but only damages affecting the real estate. The defendant's coun-

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sel then alleged that such damages would be recoverable in an action of waste, and belonged to the reversioner, and not to the plaintiff. The plaintiff's counsel insisted that this was an action for a breach of the contract contained in the lease, and that the defendant could not dispute or question the title of his landlord, and at all events the defendant was liable to the plaintiff for the breach of contract, although the damage might be recoverable in an action of waste. That said plaintiff was now, and had been, the owner of the farm, and of said lease &c., from April 3, 1859. The court said that the plaintiff was not entitled to such damages, although they were provided for in the lease. To which decision the plaintiff's counsel excepted. The defendant's counsel thereupon moved for a nonsuit. The court granted the motion, and the plaintiff's counsel duly excepted.

Mr. Raynor, for the appellant.

I. The defendant having taken the lease and entered into possession of said farm, and held the same under and by virtue thereof, is estopped from denying the title of his landlord. (3 *Abb. Dig.* 644, &c., and cases there cited.) Or that he is liable in an action for damages at the suit of the lessor, or the plaintiff, who is the assignee of said lease and owner of said farm, for a breach of the condition of said lease. (3 *Abb. Dig.* 644.)

II. The plaintiff was in truth and in fact the owner of said farm and of said lease, from April 13, 1859, together with any and all claims that had accrued or might accrue under said lease, for damages.

III. The defendant being estopped under said lease from maintaining his defense, the plaintiff should have been allowed to prove his cause of action.

IV. The plaintiff having become the owner of said farm and of said lease on the 13th day of April, 1859, ought to have been allowed to show that the breach of said agree-

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ment, and the damages to said plaintiff by reason thereof, all accrued after that time, and that the defendant was therefore liable to the plaintiff in said action, for such damages.

V. The judge at the circuit erred in holding that the plaintiff was not entitled to recover damages for the breach of the contract, although they were provided for in the lease.

VI. The judge also erred in nonsuiting the plaintiff, and especially at that stage of the trial.

VII. The lessor to the defendant was the mother and general guardian of said infant, and as such had the right and was bound to take care of his property, and lease the farm and collect the rents. (2 *Kent's Com.* 235, 7th ed.) And might also maintain an action for damages, or trespass, in her own name, and could also bring ejectment, if necessary. (*Idem.*)

VIII. On the 13th of April, 1859, the plaintiff bought the farm in question, and took it subject to the lease, which was then assigned to him. From that time to the end of said lease, all the damages done to said farm, and that in any way accrued from the breach of said contract or lease, accrued directly to the plaintiff, and he alone was entitled to recover therefor.

L. H. & F. Hiscock, for the respondent.

I. That said damages were recoverable in an action by the infant, is beyond question. That was the rule at common law, and is made so by statute. (3 *R. S.* 621, § 4, 5th ed.) This right belonged to the grantor of the plaintiff, Thacker, by statute, and it was a right that could not be waived, by an infant at least; and the counsel for the appellant must take the position that the defendant, Henderson, is liable to have collected of him, by two persons, damages, and the same damages, for the same cause of action.

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II. The plaintiff contends that the principle, "that a tenant cannot dispute his landlord's title," estops Henderson from saying that another than the plaintiff has the right to sue for the damages. We understand the rule to be this; that a tenant is, by his lease, estopped from saying he has, at the time of the taking of the lease, a better title than the landlord, and that in all actions, in which the primary and principal object is to try the question of title, he is estopped by his lease. But this is not that case. Henderson claims no interest in the land. He does not dispute the right of his landlord to lease. She might have the right to lease, and not the right to recover for waste. She might be a tenant for years or life, in possession, and doubtless as such would have the right to lease the land to him; but the action must be brought by the reversioner, or the person injured must be the party bringing the suit. "The persons who may be injured by waste are such as have some interest in the estate wasted." (*See 3 Black. Com. [Wend.] 224, marg.*) And it is well settled that the damages are to be apportioned among those entitled thereto according to their interest. The rule is, "that all parties materially interested in the subject matter of the suit ought to be made parties. All should be brought before the court, so as to make the performance of a decree safe to those compelled to obey it, and to prevent the necessity of the defendant's litigating the same question again with other parties." (*See Kidd v. Dennison, 6 Barb. 9-18.*) That was an action of waste brought by the owners in fee, (tenants in common,) and it was holden that H., who held an executory contract of sale of the interest of one of the plaintiffs, was a necessary party to the suit. (*See Christie v. Herrick, 1 Barb. Ch. 260.*) But in this case we are not driven to the necessity of impeaching the title of the lessor, ourselves. The lease provided for being terminated by a sale of the premises, and was so terminated a year previous to the end of the term, and in effecting this termination

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the lessor put upon record the evidence that she had no title to the premises, and that any action for waste belonged to her infant son, Henry N. Adams. We say, then, that even admitting that while we held under her lease, we could not question her title, yet when she (the lessor) by means of the assertion of her own want of title, and of a title in a third person, terminates the tenancy and turns us out of possession, we have a right to take her at her word, and insist that her want of title deprives her of a right to recover in an action to which the title is essential, in which her recovery would be no bar to that of her minor child.

By the Court, MULLIN, J. Norton Adams died seised of the premises described in the complaint, prior to the 28th of September, 1857. He left surviving him a minor son, Henry Adams, and his widow, Elizabeth R. Adams, now Elizabeth R. Woolston. It seems that the mother had been appointed general guardian of her son Henry, but at what time does not appear. On said 28th day of September, 1857, the widow leased the premises in question to the defendant, for the term of three years from the 1st of April, 1859, at an annual rent of \$350. If the premises were sold, the lessor had the right to terminate the lease at the end of the first or second year. The lease contained covenants on the part of the lessee, to work the farm in a good farmer like manner, and to keep it in good condition; to seed down part, &c. On the 15th of April, 1859, a contract was entered into between the said Elizabeth and the plaintiff, subject to the approval of the Supreme Court, the one to sell and the other to purchase said farm, on the terms specified in the complaint. Subsequently such proceedings were had in said court, on the petition of the said Elizabeth R., as guardian of said Henry Adams, that she was authorized to sell to the plaintiff said premises; and in pursuance of such order, said Elizabeth executed a

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conveyance of the premises to the plaintiff, whereby he became the owner of the fee of said premises absolutely, the widow having released her dower therein. It was a part of the arrangement between the said Elizabeth and the plaintiff that the lease in question should be assigned to him; and it was assigned, except the rent. The assignment bears date the 13th of April, 1859, being the same date with the contract of sale. The proceedings to obtain authority to sell were instituted in November, 1859, and completed in February, 1860. The deed to the plaintiff is dated on the 2d of April, 1860.

The action was brought to recover damages for breaches of the covenants in the lease. On the trial, the lease, assignment, agreement to sell, and the proceedings to obtain permission to sell, and the deed in pursuance thereof, were put in evidence. The plaintiff then offered to prove breaches of the covenants, caused by injury to the buildings, fences, bad husbandry, &c., which was objected to, and rejected, on the ground that the plaintiff could not maintain an action for such breaches, and the complaint was dismissed; and from such judgment this appeal is taken.

Before proceeding to examine the principal question, it is necessary to ascertain whether the lease was valid, and whether the plaintiff acquired any right or interest in the covenants contained therein. The father having died, leaving a minor child, the mother became the guardian in socage, and as such was entitled to the rents and profits of his real estate, (3 R. S. 2, § 5, 5th ed. ;) and such right continued until a testamentary or other guardian was appointed. (*Id.* § 7.) The chancellor, in *Field v. Schieffelin*, (7 John. Ch. 150,) held that a guardian in socage of real estate may lease it in his own name, and dispose of it during the guardianship. And he further held that a chancery guardian had the same power. Chief Justice Nelson, in *Holmes v. Seely*, (17 Wend. 78,) says: "A guardian in socage

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has the custody of the land of the infant, and is entitled to profits for his benefit. He has an interest in the estate, and may lease it, and recover in his own name, and bring trespass. He is in possession by right, and may of course maintain the action of trespass or ejectment against any person entering upon him without right." In *Pond v. Curtiss*, (7 *Wend.* 45,) the lease, in its commencement, read as follows: "It is agreed by and between E. Curtiss, minor, by B. Pond, his guardian &c., and Elisha Curtiss" &c. It was signed Elisha Curtiss, [L. s.,] B. POND, [L. s.] The suit was brought by the guardian, in his own name. The defendant pleaded *non est factum*, and specially, that the plaintiff was guardian, and the ward had attained the age of twenty-one before the rent sued for came due. There was a demurrer; but the court overruled it, holding that the guardian may sue in his own name, on a lease made by him in his own name, of the ward's land, even after the ward has come of age.

If then the mother was guardian in socage, she had the right to make the lease of the premises in question in her own name, and it bound the infant as effectually as if made in his name. But if the mother was not guardian in socage, but the general guardian of her son, she had, as such, the same power as a guardian in socage. (3 *R. S.* 243, § 4, 5th ed. *Id.* 244, § 10. *Id.* 245, § 20. See also opinion of the chancellor in *Field v. Schieffelin*, 7 *John. Ch.* 150, cited *supra*.)

The minor, then, as owner in fee, had no right of action for injuries to the premises covered by the covenants in the lease, except upon the lease itself. Had the lease been made without authority and the minor had done nothing to ratify it, it is quite probable that a court of equity would have protected the tenant against an action for damages, on the lease, while the lessee was liable in waste to the owner in fee. But that question is not here. Only one action can be maintained, and that action must be on the lease. If the injuries done to the property were not

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covered by the lease, a question might then arise, whether the owner in fee might not sue for waste. But that question is not here. The action is on the lease, and no recovery can be had except for such damages as are covered by it. The lease is unquestionably assignable, and the assignee can recover damages for breaches of all covenants therein which may be assigned. The question then is, are those covenants, by which the lessee obligates himself not to injure the real estate, assignable? If they are, the plaintiff was entitled to maintain this action.

Before the Code, the term "*not assignable*" had two significations; one of which was, that a particular thing was not the subject of assignment, the other, that it was not assignable so as to vest in the assignee a right of action. A right of action for an injury to the person or the character was not the subject of an assignment. A non-negotiable note was not, at common law, assignable, so as to enable the assignee to sue in his own name. But in equity, before the Code, and at law or in equity since the Code, such an assignee may sue in his own name. Covenants in a lease were the subject of assignment. Some of them could be assigned, and the assignee could sue in his own name for a breach; the breaches of others must have been sued for in the name of the assignor. When the covenant was broken at the time of the assignment, the assignee could not sue in his own name for damages for such breaches. (8 *Cowen*, 211. 2 *Hill*, 475. *Woodfall's L. & T.* 355. 2 *Hill. Abr.* 392, 393.) But where the assignee of the lease was owner of the reversion and the covenant ran with the land, then he might sue for all breaches happening after the assignment. (2 *Hill*, 274. 3 *Barb. Ch.* 52. 3 *R. S.* 37, § 17, 5th ed.) When, however, he was the assignee of the lease, but not of the reversion, and the covenants did not run with the land, he could sue in his own name for breaches occurring after the assignment. (8 *Cowen*, 211. 3 *Denio*, 297.) But if

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he did not own the reversion, he could not recover in his own name for breaches of covenants which run with the land. (8 *Owen*, 211. 3 *Denio*, 296, 297. 1 *Hill. Abr.* 129, § 74.)

The lease was assigned in April, 1859, and the assignment took effect immediately. The contract of sale subject to the approval of the court bore date the same day of the assignment of the lease, and took effect immediately. In pursuance of this agreement, title was subsequently perfected in the plaintiff. The deed from the special guardian to the plaintiff bears date the 2d of April, 1860. The contract of sale by the mother was wholly unauthorized, and did not bind either the son or the estate, except so far as the mother, as guardian, had the power to deal with the possession. I have already shown that she had, as guardian, such an interest in the premises as would enable her to maintain trespass, or even ejectment, (*see also* 5 *John*. 51,) during the son's minority. The lease to the defendant may not have covered the whole period of the minority; if not, then there was a reversionary interest in the guardian, which she would have the right to assign; and as this was the only interest the guardian had to convey, it is probable that this is all that the plaintiff got under the contract with the guardian. If this interest passed, as I think it did, the plaintiff had such a reversionary interest in the premises as would enable him to recover damages for an injury to such interest. The deed from the special guardian did not convey to the plaintiff any interest in the fee, which would enable him to sue for an injury to such estate or interest before the actual delivery of the deed, which seems to have occurred on or about the 2d of April, 1860. It was conceded, on the trial, that the defendant gave up the possession of the farm on the 1st of April, 1860. It is quite clear that no damages occurred for which the plaintiff could sue as owner of the reversion under the deed of

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the 2d of that month. If he is entitled to recover at all it must be on the ground above suggested, as assignee of the lease and the interest in the premises as tenant of the guardian under the contract of sale, which, for the purposes of the case, we must treat as the creation of a tenancy to take effect after the termination of the lease of the defendant. So far, then, as the acts of the defendant were prejudicial to the rights of the plaintiff standing in this relation to the premises, he is entitled to recover, but no further. The minor was the owner of the fee in reversion, and for injuries to such interest he had a right of action, and the bringing the one action was no bar to the action of the other, as they sued in different rights, and to protect different interests. (1 *Chit. Pl.* 51.) The learned justice held, at the circuit, that the plaintiff was not entitled to damages for an injury to the land, although provided for in the lease. In this I think he was mistaken. The proposition that the assignee of the lease, only, cannot recover for injury to the reversion, is perfectly correct. But under the peculiar facts of the case, it seems to me the plaintiff had such an interest in the reversion as entitled him to recover for injury done to it. For these reasons, I think, the plaintiff was improperly nonsuited, and that the judgment should be reversed and a new trial granted, costs to abide the event.

MORGAN, J., dissented.

New trial granted.

[JEFFERSON GENERAL TERM, October 7, 1862. *Mullin, Morgan and Bacon*, Justices.]

IN THE MATTER OF THE APPLICATION OF THE COMMISSIONERS OF THE CENTRAL PARK to confirm the report of the commissioners of estimate and assessment, for opening RIVERSIDE PARK.

The courts of this State have repeatedly held that land taken, in a city, for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use; and there appears to be no reason for doubt on the subject. *Per* LEONARD, J.

The constitution of this State having authorized property to be taken for public use, and the compensation therefor to be ascertained by a jury, or by not less than three commissioners appointed by a court of record, when these conditions have been observed, it is not the province of this court to determine, in opposition to the authority granted by the legislature, to the commissioners of the Central Park, as to the necessity for laying out new parks or squares.

The citizen is entitled to the absolute control of his estate, unless it is taken for public use, in due form of law; and this right it is the duty of the court to maintain.

His land can be so taken only by "due process of law." But when the conditions required by the constitution of the State to be observed, for the protection of the rights of the citizen, have been complied with, it must be regarded as a fulfillment of the direction in respect to "due process of law;" whether the direction be found in the State constitution, or in the fifteenth amendment to that of the United States.

The protection of that amendment can be invoked only when the right of the citizen has been invaded by a disregard of the "due process of law," as guarantied by the fundamental law of the State.

It is not a valid ground of objection to the confirmation of a report of commissioners of estimate and assessment in proceedings for opening a new park, that the lands embraced in such park are not all contiguous; that is, that there are intervening blocks and spaces not taken; where such intervening spaces are not so large as to interfere with the integrity or continuity of the plan, or the equalizing of the assessments.

Nor is it any ground of objection to such report that the commissioners have regarded the land of a railroad company, lying within the designated limits of the new park, and occupied by the company for its track, as not having been taken for the use of the park, and as not requiring any estimate for damages, or assessment for benefits.

The use of the line of the track by a railroad company is a franchise granted by law to such company, in the nature of a contract, and as such, inviolable, except under the general power reserved to the State, to alter or repeal the company's charter.

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LEONARD J. Many of the questions now urged might well be held to have been settled by a prior general term, when the proceedings in this matter were brought there by appeal from an order of the special term, confirming the report of former commissioners of estimate and assessment herein. That report was then set aside, new commissioners were appointed, and directions given in respect to their duties; but upholding the regularity and constitutional validity of the proceedings.

A brief reference, only, will be made to the objections founded on constitutional reasons.

The courts of this State have repeatedly held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use; and there appears to be no reason for doubt on the subject. The constitution of this State authorizes property to be taken for public use, and the compensation therefor to be ascertained by a jury, or by not less than three commissioners appointed by a court of record. (*Const., art. 1, § 7.*)

These conditions appear to have been observed. It is not the province of this court to determine, in opposition to the authority granted by the legislature, to the commissioners of the Central Park, as to the necessity for laying out new parks or squares. The power to lay out new parks, &c. was given by statute, in 1867, to the said commissioners, and they have exercised it as they were authorized to do. The citizen is entitled to the absolute control of his estate, unless taken for public use, in due form of law; and this right it is the duty of the court to maintain. His land can be so taken only by "due process of law." But when the conditions required by the constitution of this State to be observed, for the protection of the rights of the citizen, have been complied with, it must be regarded as a fulfillment of the direction in respect to "due process of law;" whether the direction be

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found in the State constitution, or in the fifteenth amendment to that of the United States. The protection of that amendment can be invoked only when the right of the citizen has been invaded by a disregard of the "due process of law" as guarantied by the fundamental law of the State. Any other construction of the amendment would necessarily draw to the courts of the general government all proceedings to acquire property for the public use—a result not contemplated, I think, by its framers.

The extent of the new parks &c. has been largely confided, by law, to the discretion of the commissioners of the Central Park; and the area of assessment, to the commissioners appointed by the court. We are unable to perceive that we could exercise a discretion affecting the subject, more wisely than has been done by the said commissioners. We find no ground for holding that their discretion has been unreasonably exercised, as was held in the *Matter of the Fourth Avenue*, (3 *Wend.* 452,) and in other cases.

It is also urged as an objection, that the lands of the new park are not all contiguous; that is, there are intervening blocks and spaces not taken. It is said that by this plan there are four parks laid out under this one proceeding; and that there is but one assessment of damages, while the different pieces of land so taken are of different values, are affected in different degrees, and must be accordingly assessed for benefit.

The claim that there are four parks is not well founded. There is nothing in the act requiring *all* the land within the external boundaries to be taken or included within the new park. The intervening spaces not taken in this proceeding, are not so large as to interfere with the integrity or continuity of the plan, or the equalizing of the assessment.

It is also objected that the commissioners have not taken or assessed the land occupied by the New York Cen-

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tral and Hudson River Railroad Company for its track. It is embraced within the limits of the new park, as designated by the Central Park commissioners, but no estimate or assessment has been awarded for damages, or imposed for benefit, by the commissioners whose report is now under consideration. The land of the said company was acquired many years ago, for public use as a railroad, by authority of law. The authority so to use the said land has not been repealed, and no express direction has been enacted to take the land for a different purpose or public use. It requires an express manifestation, at least, of the will of the legislature that the prior devotion of the land to the use of the public, by a private corporation, for its railroad, shall be abandoned, or that another and later demand of the land for the public use shall supersede the former use, in order to justify the change. The power so to take the land after a prior devotion to a public use, cannot be implied. The continued use of the railroad is not so inconsistent with the authority to lay out a public park, embracing a part of the line of a railroad track, as to justify the taking of the land in this proceeding, and stopping its use by the railway company. The public authority may lay out a street or highway so as to intersect the route of a railway, but the use as a street or highway must be subordinated to the ordinary and necessary use of the railroad at the crossing, with the observance of the signals required by law, on the part of the railroad company.

The use of the line of the track is a franchise granted by law to the said company, in the nature of a contract, and as such inviolable, except under the general power reserved to the State to alter or repeal the act by which the said company is incorporated.

We think the commissioners of estimate and assessment properly regarded the land of said company within the designated limits of the new park, as not having been taken

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for the use of the park, and not requiring any estimate for damages.

In respect to the omission to assess the land of the said company for benefit, it is necessary only to observe that the said land can be used for no purpose except that of a railway; and hence that the land itself is not benefited; or rather, the benefit will not apply to the land of the railroad company. (*The Owners &c. v. The Mayor &c.*, 15 Wend. 374-7.)

It is also urged that the costs and expenses of the proceedings had under the direction of the former commissioners of estimate and assessment, whose report, on appeal to the general term, was set aside, and the matter committed to new commissioners appointed by the general term, ought not to be included in the present report, nor assessed upon the property benefited by the proposed improvement. It appears that the new board of commissioners adopted a large part of the work of the former board, and that the labors of the new board were chiefly required in making a computation of the assessments for benefits, and estimates of damages on a different valuation of the lands affected. The other costs and expenses for work &c., including the maps and surveys found to be correct and useful, were properly allowable. The work of the new board was a continuation of that of the former one, taken at a certain point, different values being adopted.

We think that none of the objections are well taken.

The objections on behalf of Mr. Geo. H. Peck appear to be founded on a mistake as to the facts.

The report should be confirmed.

PRATT, J., concurred.

BARRETT, J., expressed no opinion as to the effect of the fifteenth amendment to the constitution of the United

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States upon the rights of citizens of this State. He concurred in the result; holding that the property in question had been taken by "due process of law," as contemplated by the Federal as well as by the State constitution.

Report confirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, July 23, 1872. *Leonard, Barrett and Pratt*, Justices.]

 CUMINES and others vs. THE BOARD OF SUPERVISORS OF
JEFFERSON COUNTY.

It *seems* that acts of the legislature authorizing municipal corporations to bond themselves in aid of the construction of railroads, are valid and constitutional as an exercise of the taxing power.

The legislature, on the 29th of March, 1869, passed an act authorizing certain towns in Jefferson county to take stock and issue bonds therefor, in aid of a railroad company therein mentioned. The act declared that the bonds, issued in the manner therein directed, should be *valid and binding* upon such towns, in the hands of *bona fide holders or owners thereof*. The commissioners to be appointed under the act, to issue such bonds, were required to report to the board of supervisors of said county, within three days of their regular session, in each year, the amount of money required to pay principal and interest on the bonds issued by them; and the act directed that the said board *should*, thereupon, cause to be *assessed, raised and collected* upon and out of the real and personal property of such town, the sum so reported; and that such amount, when collected, should be paid and applied by the commissioners to the payment of the principal and interest of such bonds. On the 8th of May, 1869, the legislature passed an act to incorporate the city of Watertown, which was to embrace within its limits two of the towns mentioned in the former act; but it was expressly provided that nothing therein contained should be taken or construed to affect the right of the town of W., as it formerly existed, to bond itself under the act of March 29, 1869, or to affect such act. On the 9th of March, 1870, the legislature passed an act "to relieve the towns of W. and P. from embarrassment in the execution of the act of March 29, 1869, arising from the act of May 8, 1869, and to facilitate the construction of" the said railroad. It provided that whenever it should become necessary to levy any tax for the payment of interest

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and principal upon bonds issued by the towns of W. and P., the board of supervisors should possess the *power*, and it should be their *duty* to levy and collect the same, &c. In accordance with the provisions of this act, proceedings which had been inaugurated under the act of March 29, 1869, were perfected, and bonds issued, and the stock subscribed for by the towns of W. and P. and the bonds passed into the hands of persons holding them for value, and in the faith that they were duly and legally issued. The board of supervisors refused to levy and collect a tax for their payment.

Held, 1. That in respect to the validity of the proceedings to bond the towns, so far as they were affected by the constitutionality of the acts, a *certiorari* would have brought up the acts, and therefore it might well be doubted, whether the plaintiffs, instead of asking for an injunction to restrain the board of supervisors from raising the necessary funds, by taxation, to pay the interest on the bonds issued, and for judgment declaring the bonds void, and the act authorizing their issue unconstitutional, had not a perfect remedy at law.

2. That if there were any doubt as to the intent or meaning of the act of March 9, 1870, or as to the extent or limitation of its provisions, it would be in accordance with the well established rules of construction of statutes, to look at the title thereof.
3. That an examination of the provisions of that act left little or no doubt as to the purposes thereof; and that those provisions were as valid as if found in the first act.
4. That the objections that the act of 1870 was invalid and unconstitutional; that there were numerous defects and imperfections in the proceedings; and that a tax-payer had no standing in court authorizing him to maintain an action, having been determined against the plaintiffs, in a former action brought by them against the commissioners, that decision was entitled to respect, and must be followed, upon the principle of *stare decisis*.
5. That legislation of the character of that involved in this action having become very extensive, in this and other states, and having been upheld so often by the courts, it was only a reasonable deference, on the part of the court at special term, to follow the current, until an appellate court should interpose with an adjudication to the contrary.
6. That the statutes did not require, by their terms, a formal acceptance of the provisions thereof. That they provided for consents, defined the number necessary, and the amount of property which should be represented by them. And that in determining these two latter requirements, reference must be had to the acts of March 29, 1869, and to the act of 1870.
7. That a compliance with the statutory requirements being had, the commissioners were expressly authorized to subscribe for and take stock, and to issue the bonds, which were declared to be obligatory upon the town.
8. That the plaintiffs were not entitled to an injunction restraining the levying of a tax by the board of supervisors, to pay the interest upon the bonds; or to a judgment declaring the bonds void and the statute unconstitutional.

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THIS action was commenced on the 17th of November, 1870, and an injunction order was granted November 19, 1870, by Justice DOOLITTLE, with an order to show cause; and upon the hearing of the order to show cause, the injunction was dissolved, and the defendants raised the requisite funds by taxation to pay the coupons due in 1871, &c. The order dissolving the injunction was not accompanied by any opinion delivered by the justice granting the same. The plaintiffs asked, in their complaint, to restrain the defendants from raising the necessary funds by taxation to pay the interest to become due on the \$300,000 bonds issued by the town of Watertown under the "bonding act" of 1869, and the acts amendatory thereof; and they seek a perpetual restraint upon the defendants, forbidding them from raising by taxation the funds needful to meet from time to time the maturing interest; and that it be declared that the bonds are void, and that the act is unconstitutional. And that if valid, it has not been complied with, and that the plaintiffs' property ought not to be assessed for the purpose of paying interest or principal of such bonds, &c.

L. J. Dorwin, and Lansing & Sherman, for the plaintiffs.

James F. Starbuck, for the defendants.

HARDIN, J. On the 29th of March, 1869, the legislature passed an act known as "An act to authorize the towns of Wilna, Champion, Rutland, Le Roy, *Pamelia*, Watertown, Brownville and Hounsfield, in Jefferson county, to take stock and issue bonds therefor, in aid of the Carthage, Watertown and Sackett's Harbor Railroad Company." (*Laws of 1869, ch. 75.*)

Section 1 of this act authorizes and requires the county judge of Jefferson county, upon the application of twelve or more "freeholders, to appoint three commissioners,

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who shall hold their office for three years and until their successors are appointed; and authorizes a majority of them to subscribe, in the corporate *name of such town*, to the capital stock of the said Carthage, Watertown and Sackett's Harbor Railroad Company, and issue bonds for the *payment* of such stock to an amount not exceeding fifteen per cent of the assessed valuation of the real and personal property of said town appearing upon the assessment roll of the year 1868." And discretion is given by the act to the commissioners as to times and places of payment of said bonds; and then follows a proviso in respect to the powers and acts of the commissioners, in these words, viz: "provided, however, that no subscription to stock shall be made, or bonds issued as aforesaid, *until the consent in writing* specifying the amount of such subscription and bonds to be issued, be first obtained of a majority of the *tax-payers appearing* on the assessment roll of such town for the year 1868, representing a majority of the taxable property therein."

This act contains other provisions as to the manner of carrying out the purpose of the act, to which it is not necessary to allude, at this time; except the one contained in section seven of said act, which is as follows:

"§ 7. All bonds issued by the commissioners of the towns aforesaid *shall be valid and binding* upon the towns represented by such commissioners, in the hands of *bona fide holders or owners thereof*; and in case of any error, fraud or willful violation of duty on the part of any commissioner, in the issue of such bonds, the town which he or they represent shall have redress upon his official bond, to the extent provided therein."

The proofs in this case establish that quite a large portion, if not all, of the bonds of the town of Watertown, issued by the commissioners of that town, are in the hands of *bona fide* holders, and they are entitled to protection under the provisions of the seventh section, so far as it

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affords protection against some of the grounds of error alleged by the plaintiffs against the validity of the bonds, if the act in question is valid. Besides, it may be observed there is no proof given, in this case, to show that the bonds, to the whole amount of the principal sum for which the defendants were asked to raise funds to pay maturing interest, were not, at the time of the request by the commissioners upon the defendants, in the hands of *bona fide* holders, and therefore within the class, as well as situation, which the section expressly declares shall be valid and binding upon the town issuing the same.

By section 3 of the act, the commissioners are required "to report to the board of supervisors of said county within three days of their *regular* session in each year, the amount of money required to pay principal and interest on the bonds thus issued, * * * and the said board of supervisors SHALL thereupon cause to be *assessed, raised and collected*, upon and out of the real and personal property of *such town*, at the same time and in the same manner as other taxes for town and county purposes are levied and collected, *such* sum as shall be thus reported to said board as necessary to pay said principal and interest; and such amount, when collected, *shall be paid* and applied by the commissioners to the payment of said principal and interest of the bonds aforesaid."

It will be observed by the provisions of the act quoted, that to some extent it differs from the provisions of the general act passed for "bonding for railroad purposes."

The same legislature, on the 8th day of May, 1869, passed "an act to incorporate the city of Watertown." (*Laws of 1869, ch. 714.*) The country embraced within the city limits, by the provisions of said act of incorporation, consists of portions of the town of Watertown as it had theretofore existed, and portions of the town of Pamela, as it had theretofore existed.

It was expressly provided in the act chartering the city

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of Watertown, in section 18, that "nothing in the act shall be taken or construed to affect the right of the town of Watertown as it existed prior to the passage of this act, to *bond itself*, according to the terms of the act," already quoted. And it was further provided, in the incorporating act, "that nothing in the act" should be construed to affect an act entitled as the act of March 29, 1869, which title in words is repeated.

The act of May 8, 1869, does not by express words contain any provision expressing any purpose on the part of the legislature to repeal, modify or render impossible of execution, the act of March 29, 1869; nor does it contain words justifying the inference that the prior act was repealed or impaired. The legislative intent is clear that the former act, with all its provisions, should remain in full force and vigor.

Proceedings were taken by tax-payers to avail themselves of the provisions of the act of March 29, 1869, and were in a state of progress, looking to the bonding of the town, for \$300,000, in aid of the railroad in question, and to authorize the commissioners who had been appointed by the county judge under the act, in behalf of the town of Watertown, and certain objections had been made in respect to the proceedings, and many questions had arisen in respect to the validity of the proceedings so instituted.

An application was made to the legislature of 1870, and that body passed an act known as chapter 52, entitled "An act to relieve the towns of Watertown and Pamela from embarrassment in the execution of chapter seventy-five of the laws of 1869, arising from chapter 714 of the laws of 1869, and to facilitate the construction of the Carthage, Watertown and Sackett's Harbor Railroad Company." (*See Sess. Laws of 1870, p. 127.*)

If there was any doubt as to the intent or meaning of this last act, or as to the extent or limitation of its provisions, it would be in accordance with the well established

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rules of construction of statutes, to look at the title thereof. The English rule was otherwise, and indeed the title to the acts of parliament have been said to be no part of the act. (*Mills v. Wilkins*, 6 *Modern*, 62.) But in this country, subject to the qualification already alluded to, the rule is otherwise. (*Hadden v. The Collector*, 5 *Wall.* 110.) But an examination of the act of 1870 leaves little or no doubt as to the purposes thereof. Its provisions are quite elaborate and definite. It expressly directs the manner in which the commissioners may give the bonds required of them respectively, and it expressly provides that when such bonds are given, in the manner therein provided for, they "shall be held and enforced" by the supervisor authorized to take the same, for the benefit of the persons or tax-payers of the original territory embraced in the old political divisions. Section 3 of the act also provides, that whenever it shall become necessary to levy any tax for the payment of any interest and principal upon the bonds issued by the commissioners *appointed* for said town of Watertown, "the board of supervisors of the county of Jefferson *shall* possess the *power*, and it *shall* be their *duty*, to levy the same upon the taxable property, real and personal, of the town of Watertown and *of that part* of the city of Watertown which constituted part of the town of Watertown on the said 8th day of May, 1869," and a like mandatory provision in respect to the territory formerly belonging to the town of Pamela.

The act provides, further, as to consents, and as to the time in which they may be obtained; and that fresh ones may be added to those already obtained; and declares what shall be deemed taxable property upon the assessment roll of 1868. Its provisions are as valid as if found in the first act. (7 *Wallace*, 623, 624.)

In accordance with the provisions of this act, the proceedings inaugurated under the act of 1869 were perfected and the bonds issued by the commissioners, and the stock

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subscribed for, and the bonds passed into the hands of persons holding them for value, and in the faith that they were duly issued in pursuance of law.

Prior to the passage of this last act, one of these plaintiffs, with others, brought an action, in this court, against the commissioners of the town of Watertown and said railroad company, and obtained a preliminary injunction, and a final judgment thereon was entered in June, 1870. The trial took place after the passage of the act of 1870. And its provisions were very fully and ably examined by the justice who presided at the trial. He reached the conclusion that the act of 1870 was valid and constitutional. That determination, so far as the questions made in that action are similar to the ones made here, is entitled to respect, and must be followed, upon the principle of *stare decisis*. (34 How. 302.) The plaintiffs in that action obtained some relief, based upon defects and imperfections in the proceedings existing at the time of the commencement of that action, and which were held not to be obviated or validated, as to the action then being determined, by the corrective act of 1870.

It is insisted, in this action, that a tax-payer has no standing in court, authorizing him to maintain this action. The very able and exhaustive argument made here, upon that question, would have great weight, and would be carefully examined and probably adopted, had not the justice expressly overruled the same in the former action.

The plaintiffs, by their learned counsel, have taken numerous objections to the consents, and to the various steps of the proceedings under the acts alluded to; but they have to such an extent been determined adversely to them, in the former action, that an examination thereof here is not entered upon, for the reason already stated. No original or personal opinion can be with propriety given in respect thereto, without violating a well settled

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rule, in respect to precedents, which has obtained in this district.

In respect to the validity of the proceedings so far as they are affected by the constitutionality of the acts, it may be observed that a certiorari would have brought up the acts, and therefore it might well be doubted whether the plaintiffs, in that regard, would not have a perfect remedy at law. (45 *N. Y.* 776, 777. 2 *Abb. N. S.* 233.)

The learned justice, who heard the former action, reached the conclusion that unless in a very clear case, it was not the province of the special term to pronounce against the validity of an act of the legislature. His conclusion is supported by very numerous authorities worthy of respect. (43 *Barb.* 54. 26 *N. Y.* 467. 35 *id.* 551. 9 *John.* 563.) It is not improper to add that legislation of the character of that involved in this action has become very extensive in this and other States, and has been upheld so often, at special term, as well as at general term, that it is only a reasonable deference on the part of the court at special term to follow the current, until an appellate court shall interpose with an adjudication otherwise.

It is generally known that Justice Woodruff, in the United States circuit court, has lately held that even an act which authorized a town to issue its bonds and donate them to a rail road company without any equivalent, (expressly as a gift,) was valid and constitutional. The United States Supreme Court, in two cases, has approved of legislation of the character of the acts now under consideration. (3 *Wallace*, 327. 7 *id.* 610.)

The Court of Appeals, of this State, in a late case, reviewed one of these "bonding acts," and the only enunciation made by it was based upon the assumption by it that the act was valid; holding that it must be strictly pursued and rigidly construed; thus impliedly assenting to its va-

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lidity. Such seems to be substantially conceded by the opinion of Allen, J., in *The People v. Smith*, (45 N. Y. 781.)

The acts do not require, by their terms, a formal acceptance of the provisions thereof. They provide for consents, define the number requisite, and the amount of property which shall be represented by the consents; and in determining these two latter requirements, reference must be had to the act of March 29, 1869, and to the act of 1870. (3 *Wallace*, 327.) A compliance with the requirements being had, the commissioners are expressly authorized to subscribe for and take stock, and to issue the bonds, which are declared to be obligatory upon the town. It has been held in *The People v. Miner*, (2 *Lans.* 411,) that the commissioners are agents of the town, authorized in virtue of the consents, and by the legislative enactment, to perform certain acts, which, if done in compliance with the requirements of the law, bind the tax-payers of the town.

The commissioners become instruments to aid in carrying into effect the provisions of law passed by the legislature in the exercise of its taxing powers.

The conclusion is reached that the plaintiffs are not entitled to the relief demanded in their complaint; and that the same must be dismissed, with costs.

[JEFFERSON SPECIAL TERM, August 30, 1872. *Hardin*, Justice.]

In the matter of JOHN G. LAMBERSON.

Under the provision of the Revised Statutes directing that where the real estate of a deceased person shall have been sold by order of a surrogate, the moneys arising from the sale shall be brought into the office of the surrogate, for the purpose of distribution, and shall be by him retained for that purpose; and requiring the surrogate, in the first place, to pay, out of such moneys, the charges and expenses of the sale, there can be no *lien* upon such moneys, even for the fees and disbursements upon the application for the sale.

The entire fund must be brought intact into the office of the surrogate, and the attorney can then apply to that officer, whose duty it will be, before making the general distribution, to award and pay him a reasonable fee for his services in the matter of the sale, together with his necessary outlay thereon. For services rendered to the administratrix, apart from the matter of the sale of the real estate, there is not only no lien, but no right to priority of payment. Such priority is confined to the "charges and expenses of the sale." And apart from the statute, in any case where moneys are realized or received under the orders of a court, competent to deal equitably with the fund, there can be no *lien* upon the same for any services rendered; but such services must be paid for, if it be sought to charge the fund, by the order of the court where the matter is pending.

A PPEAL from an order made at a special term, on exceptions to referee's report as to moneys arising from a sale of real estate under the order of a surrogate.

By the Court, BARRETT, J. The statute provides that where the real estate of a deceased person "shall have been sold by virtue of the order of a surrogate, the moneys arising from such sale shall be brought into the office of the surrogate granting such order, for the purpose of distribution, and shall be by him retained for that purpose." (2 R. S. 106, § 35.) It is further provided, (*Id.* § 36,) "that the surrogate shall, in the first place, pay out of the said moneys the charges and expenses of the sale."

There can be no lien upon such moneys, even for the fees and disbursements upon the application for the sale.

The entire fund must be brought intact into the office

In the matter of Lamberson.

of the surrogate, and the attorney can then apply to that officer, whose duty it will be, before making the general distribution, to award and pay him a reasonable fee for his services in the matter of the sale, together with his necessary outlay thereon.

For the services rendered to the administratrix apart from the matter of the sale of real estate, there is not only no lien, but no right to priority of payment. Such priority is confined to the "charges and expenses of the sale."

Apart from the statute, however, we are of opinion, that in any case where moneys are realized or received under the orders of a court competent to deal equitably with the fund, there can be no lien upon the same for any services rendered, but such services must be paid for, if it be sought to charge the fund, by the order of the court where the matter is pending.

The claim to hold any part of the moneys in question is therefore without foundation, and the order appealed from must be reversed, the exceptions to the referee's report sustained, and the report set aside with \$10 costs of this appeal.

[FIRST DEPARTMENT, GENERAL TERM, at New York, April 1, 1872. *Ingram and Barrett*, Justices.]

YOUNGHAUSE vs. FINGAR.

The plaintiff, in a case originating in a justice's court, recovered a judgment for \$95 damages. The defendant appealed to the county court, specifying in his notice of appeal, among other grounds of error, that "the judgment should have been more favorable to him in this particular, to wit, that said judgment should not have been for more than \$25 damages, besides costs." The plaintiff served no offer to modify the judgment. The plaintiff recovered but \$49, in the county court, and that court allowed him costs; and the Supreme Court, on appeal, affirmed the judgment of the county court. *Held*, on a re-argument, that the judgment of the county court, so far as it adjudged costs to the plaintiff, was erroneous.

Held, also, that the notice of appeal was a sufficient compliance with the amendment to section 371 of the Code, made in 1866, which provides that if the appellant "claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount." Yet it seems that in bringing this class of appeals, greater caution should be observed, by following more closely the language of the statute, instead of adopting the form of notice in this case as a *good* precedent.

Liberality, in the construction of that statute, should always be indulged; especially in a justice's court proceeding. The notice is sufficient if it gives the respondent notice of the *particular* complained of, in the amount of the judgment. It is then for the respondent to correct it.

THIS is a motion on a re-argument of a case originating in a justice's court, where the plaintiff recovered \$95 damages, and the defendant appealed to the county court therefrom. In the county court the plaintiff recovered but \$49 damages, and the question was, and is, which party was entitled to costs. The defendant, in his notice of appeal, stated the following grounds, among others, as error: "*The judgment should have been more favorable to him in this particular, to wit, that said judgment should not have been for more than \$25 damages, besides costs.*" The plaintiff served no offer to modify the judgment. The county court allowed costs to the plaintiff. An appeal was taken to the Supreme Court, where that judgment was affirmed. The defendant obtained leave to take the case to the Court of Appeals. The Court of Appeals dismissed the case, on the ground that it was not appealable; but all the members

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of that court concurred in an opinion that the question of costs was erroneously decided, in the court below. The case now being again in the Supreme Court, the defendant asked for a re-argument, in order to move for such a judgment for costs as ought to have been rendered, in the case, upon the law as now expounded by the Court of Appeals.

R. E. Andrews, for the plaintiff.

Beale & Bouton, for the defendant.

By the Court, P. POTTER, J. This case comes before us upon a re-argument, a motion for that purpose having been heretofore granted. The case has been to the Court of Appeals. That court having expressed their views of the law of the case, it necessarily carries with it, to us, the adoption of their opinion in our decision now, upon the merits.

Taking the *obiter* opinion of the Court of Appeals as the true interpretation of the statute, the granting a re-argument seems to be in furtherance of justice; for the decisions below, according to that opinion, must be erroneous. It is now in our power to correct that error, and we should regard it to be our highest duty to render justice according to law. The consent of this court, that the case should be taken to the Court of Appeals, was in the hope of obtaining from that court an adjudication of that vexed question which has, for years, greatly perplexed the bar, and suitors; and the more so, by the fact that coördinate branches of the Supreme Court had arrived at directly contrary conclusions, and their conflicting views had been adjudicated, and their opinions expressed, and reported in the books; and yet with no apparent power of getting a review in the court of last resort; for the reason that the cases were supposed to be unappealable.

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Upon the construction of no modern statute in relation to a question of practice, has there been more conflict of opinion in the courts than that in regard to the effect of notices of appeal made in certain forms, from justices' courts, under section 371 of the Code. Especially was this so, before the amendment of this section, in 1866. It was a matter of sincere regret to the profession, and to the courts below, that this question could not have its settlement in the court of ultimate resort. And inasmuch as the decisions and judgments below were generally regarded as not appealable, it still remained a vexed as well as a doubtful question to the parties, to the bar, and to the courts; increasing in complexity as reported cases were multiplied, and by the different views of interpretation by courts of coördinate authority, in different judicial districts and departments. Not only judges in different districts, but judges in the same districts, with equal integrity of purpose, and with equal power of reasoning, were found forming antagonistic views of interpretation of the same statute; and judges having *antagonistic* views of the rules of construction were found uniting in the same result, and judges with *united* views of construction were found, also, coming to antagonistic results. Such a condition of incertitude and perplexity surely demanded relief; and this relief it was the object of this court, if possible, to obtain. And it was with this view, and in this hope, that the case before us was allowed, upon an application made for that purpose, to be carried to the Court of Appeals; though not without the apprehension of its being dismissed (as it has been) on the ground that the case was not appealable. We have, nevertheless, accomplished the very greatly desired object, of getting the voluntary (but *obiter*) interpretation of this statute from the highest judicial State authority, though at the expense of a gentle rebuke for sending up the case without a written opinion. We accept the reproof with kindly feeling, and hope to excuse this

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omission of an opinion, by the good that has resulted ; and by the fact that there were cited, in the briefs before us, and can be found in the books of reports, at least ten opinions, already too many, and too much in conflict ; embracing all views of judicial construction, upon the very point decided in this case. We admit that we labored under the belief that another opinion by us, which must be in all its features like some of those already reported, would add nothing, by way of authority, to that high court of review. The uselessness of our sending up to that court an opinion, seems now the more manifest, in the fact that not one of all the various reported decisions contained in the briefs is referred to, in the opinion of the Court of Appeals. Glad as we are to have received this interpretation of the statute in question, it will be our pleasure, as we shall deem it to be our duty, to follow, and to adopt it now in this court, which has jurisdiction of the question. Such an adoption and adjudication will be greatly useful to the profession, in removing the doubts and conflicts of opinion which have heretofore occasioned so much embarrassment, in this most prolific cause of litigation. We may also, at the same time, render a service to the profession by giving a slight review of the reported cases upon this point, to show the conflict between them, and the cause of departure in judicial construction, in that regard.

The statute in question was passed in 1862, and was an amendment to the 371st section of the Code as first adopted. The first reported decision under this section, giving it construction, was *Fox v. Nellis*, at special term, in March, 1863, reported in 25 *How. Pr.* 144. The opinion in the Court of Appeals, now given, is in exact accordance with the decision in the case of *Fox v. Nellis*. This section of the statute was passed to regulate costs in appeals from justices' courts, and the section then read as follows : " *In the notice of appeal, the appellant shall state in what par-*

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ticular or particulars he claims the judgment should have been more favorable to him. Within fifteen days after the service of the notice of appeal, the *respondent*, may serve upon the *appellant* and justice an offer, in writing, to allow the judgment to be corrected *in any of the particulars* mentioned in the notice of appeal. The *appellant* may, thereupon, within five days thereafter, file with the justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct the judgment accordingly; and the same, so corrected, shall stand as his judgment, and be enforced accordingly. * * If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below; or, if such offer be made and not accepted, and the judgment of the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs." In *Fox v. Nellis* a judgment had been recovered, before the justice, for \$159.50. In the notice of appeal, it was stated that the *particular* in which the appellant claimed the judgment should be more favorable to him was, "that the judgment should not have been for more than \$5." It was there held that this was a sufficient statement of the *particular* required by the statute; to wit, as to its *amount*, that it was for too large an amount; that such a statement was sufficient to cast upon the respondent the duty of acting, on his part. He knew, as well as the appellant, whether he had obtained an unjust or an unrighteous judgment; and if so, he was, by this statute, put upon his conscience, and at the peril of future costs if he refused to correct it; and if he refused, he would be justly punishable with costs. But if he made a conscientious correction, *in this particular*, then he threw the hazard of future costs upon the appellant if he did not accept the correction. This seemed to be a wise provision of the statute, calculated to check litigation, as well as to avoid

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the obtaining of unconscionable judgments. With this interpretation of its meaning, it seemed to be in view of substantial justice between the parties. This view was followed, at general term, in the sixth district, in the case of *Loomis v. Higbie*, (29 *How.* 239,) by BALCOM, J., in a well reasoned opinion. The same case also distinguishing between making the *same* judgment more favorable to the appellant, and one in which the notice claimed an *entire reversal*, or a judgment in favor of the appellant. This was followed by *Reed v. Moore*, (31 *How. Pr.* 264,) also a general term decision, Parker, Mason and Balcom, JJ.; they holding that the case of *Fox v. Nellis* put forth the true interpretation of this statute. Again, in *Wynkoop v. Halbut*, reported in 43 *Barb.* 266, at general term, Mason, J., delivering the opinion, *Fox v. Nellis* was adopted as laying down the true rule. Following this is the case of *Myers v. White*, at general term, third district, reported in 37 *How. Pr.* 393, Peckham, Ingalls and Hogeboom, JJ., in which it is said, "*Fox v. Nellis* lays down the true construction of the statute."

But there are reported cases in which entirely different views are taken of the statute; of its meaning and intent. The first of these departures, as claimed, is the case of *Barnard v. Pierce*, reported in 28 *How.* 232, decided by the superior court of the city of Buffalo. But an examination of this case shows that it is not really in conflict with what was decided in *Fox v. Nellis*, but actually sustains that case. True, the learned judge who delivered the opinion in *Barnard v. Pierce* says that the judge who delivered the opinion in *Fox v. Nellis* "misconceived the provisions of the statute," in one particular, to wit, "that he made the *respondent*, instead of the *appellant*, the actor." With great respect for the learned judge, he was mistaken in his facts. It will be seen by a closer reading of the opinion in *Fox v. Nellis*, that no such proposition is to be

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found therein; but on the contrary, it holds that each party in turn is called upon to act.

The next case in order of date, which is claimed to be adverse to *Fox v. Nellis*, is *Forsyth v. Ferguson*, (27 How. Pr. 67.) It is equally a mistake to place this case in conflict. Indeed the same question does not arise there at all. The notice of appeal, in that case, was as follows: "1st. The justice adopted an improper rule of damages; 2d. The damages should be merely nominal, under the evidence, *if the plaintiff is entitled to any damages*; 3d. The judgment should have been *in favor of the defendant*, and against the plaintiff." Neither of these causes specified any *particular* in which the judgment should be more favorable to the appellant. The first objection did not state what rule of damages the justice adopted, so that it could be seen whether it was or was not unfavorable. The second objection did not even stop at saying the judgment ought to be merely nominal, but that the plaintiff was not entitled to any judgment, and was in alternative terms; not fixing either. And the third objection was, not that the judgment should be more *favorable* to the appellant, but asked judgment entirely for himself. Besides, the objection was hypothetical. This was no compliance with the provisions of the statute; and the case was correctly decided. I concur in the correctness of the decision in that case. But in deciding it correctly, certain *obiter* remarks, contained in the opinion of that learned judge, have been adopted, in other cases, as an adjudication; and upon these began the departures to another and different construction of this statute, which followed. Those remarks are as follows: "*To conform to this section of the statute, it should be claimed, unqualifiedly, that the judgment should be reduced to some certain amount, or, in some other respects, specified in the notice, as the case may require.*" I have italicised this language because it seems to have been the basis of other decisions, not only, but probably the

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cause of legislative action, in 1866, to make this statute in fact what this language would seem to hold to be its construction and *intent*; though no such language was *then* in the statute itself. This language was not necessary to the decision of that case; and with due deference, and with the very great respect which I entertain for that learned judge, and the court whose language he is supposed to have spoken, this *obiter* expression does not meet my view as coming within any *rule of construction*, as it certainly is not found in the *letter* of the statute referred to. It cannot be alleged that there is any obscurity, ambiguity or defect of expression in this statute, which required this *obiter* remark. And a decision according to the strict letter of the statute, in such a case, leads to no false consequences, or to injustice. I understand the rule to be, in the construction of a statute, that when an act is conceived and expressed in clear and precise terms, which lead to nothing absurd, there is no reason not to adopt the sense which its plain language presents. To depart from its language, and go in search of conjectures, to restrain, enlarge or extinguish it, is to elude it. (*Vattel*, B. 2, ch. 17, § 263. *Jackson v. Lewis*, 17 John. 475. *The People v. New York Central R. R.*, 13 N. Y. 78.) The statute in question is a remedial statute; its object is to give the aggrieved party relief from injustice; and it is the duty of courts, under such a statute, so to construe it as to advance the remedy in every way that it can consistently be done. And is more strictly so, in proceedings in justices' courts. I think it was intended to impose upon the appellant no obstacle, and to require of him but a simple compliance with its plain and unambiguous language, to entitle him to its benefits.

Following this *obiter* dictum in *Forsyth v. Ferguson*, comes the case of *Wallace v. Patterson*, reported in 29 How. Pr. Rep. 176, decided in the fourth judicial district; which case was correctly decided, upon the merits, but not ac-

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cording to the reported opinion, which discusses a question that was not in the case. The notice of appeal did not state any *particular* wherein the judgment should be made more favorable; but claimed that the judgment should be *reversed entirely*. This case did not come under the 371st section of the Code; and it required no construction whatever of that section; but it was an appeal under section 353, and was decided upon that view. Notwithstanding this, the opinion delivered in the case, as written, proceeds *obiter* to give construction to section 371, following and adopting the *obiter dictum* in *Forsyth v. Ferguson*, and adopting that as the true construction of the statute, and overruling *Fox v. Nellis*, and *Loomis v. Higbie*, with these *obiter dicta*. But although this opinion was published, and has since been quoted as authority, it so happens that all that part of the opinion which discusses the construction of section 371 was never adopted by the court as its opinion, nor its publication authorized by its author; but, like too many of the reported opinions in Practice Reports, was somehow obtained and published as written, by some other person; perhaps the counsel in the case. As thus published, it seemed to have overruled *Fox v. Nellis*, and *Loomis v. Higbie*.

Smith v. Hinds, reported in 30 *How. Pr.* 187, is also claimed to be adverse to *Fox v. Nellis*, on the ground that the court, in their opinion, cite *Forsyth v. Ferguson* with approbation; but even *Smith v. Hinds* was decided not upon that ground, but on the ground of the omission of the appellant to serve his notice of appeal on the justice. There is one peculiarity in this case, to wit, the recovery before the justice was \$48. In the notice of appeal, the appellant claimed that the judgment should have been more favorable to him in that it should have been for only \$45, and then again that it should have been only \$40, and so continued dropping \$5 in each succeeding claim, until the last was for \$30. On the new trial the plaintiff

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recovered \$37. The respondent made no acceptance of any of the offers. It was held that upon this ground the appellant was entitled to costs; and it was also held that having *several particulars*, each reducing the former, did not invalidate the notice. There is nothing said in this case that is in conflict with *Fox v. Nellis*, and it cannot be so counted in the number. Upon the true ground, that the notice was not served on the justice, it was correctly decided.

A clear case of conflict, however, is that of *Gray v. Hannah*, reported in 30 *How.* 155. This was a general term decision, of the seventh district. It takes the widest departure from *Fox v. Nellis*, and *Loomis v. Higbie*, of any case found in the books. In that case the judgment recovered before the justice was \$86, and the specification in the notice of appeal was, "that the judgment ought to have been more favorable to the appellant, in that it should not have been for a sum exceeding \$35 with costs, and the defendant therefore offers to allow such judgment to be corrected accordingly." The plaintiff made no offer to correct the judgment, and recovered less in the county court than in the justice's court. The county court allowed the appellant costs, but the Supreme Court reversed the order, and held that the notice above mentioned was insufficient to carry costs to the defendant. They held that *Fox v. Nellis*, and *Loomis v. Higbie*, and the other cases holding the same rule, were not authority. They not only adopt the dictum in *Forsyth v. Ferguson* "that the notice must specify, separate and distinguish in a tangible form, so that the respondent may comprehend the precise change in the judgment to which he is willing to consent," which the statute did not require, but they add that such a notice does not specify, point out, or distinguish any particular error; and in a most able argument conclude by saying that any other interpretation of the statute than such as they have given, they "cannot but see does great injustice."

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All these decisions were prior to the amendment of the statute in 1866, and it is seen from this review, that equally able jurists, in the different judicial districts of the State, had arrived at diametrically different conclusions, in giving interpretation to the same language in the same statute. With equal desire to express the true meaning and intent of the same legislative enactment, it is seen that an unfortunate difference existed in the courts; and directly conflicting opinions found their way into the reports, to the great embarrassment and perplexity of parties and to the profession. How could counsel feel secure in giving advice? Courts of coördinate authority, equally respectable in learning and ability, had put themselves in direct conflict. This was the condition of things when, in 1866, the legislature, perhaps with the laudable intent to relieve this very embarrassment, and to make the intent of the statute more plain and clear, amended this section, 371, by this addition in regard to such notice of appeal. "*If he (the appellant) claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount.*"

After this amendment, it seemed to be the impression of the bar, and indeed of many judges of the courts, that this amendment had wrought a change in the statute, in calling for more certainty in the form of the notice of appeal; that a failure to state the *certain* specific sum, in unqualified language, was to be held a defective notice; and that it was not an equivalent, nor a compliance with the letter or spirit of this amendment, to say the judgment ought not to exceed a certain sum. It was so interpreted in the fourth judicial district, and so adjudged, and in other districts. It still remained a controverted question. This was the condition of things when the case at bar was before us for review. Several general term decisions, some unreported, were presented to us, holding that a case that stated that the judgment should not exceed a certain sum

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did not state, in the language of the amendment, "*what should have been its amount.*" We reluctantly bowed to the apparent weight of authority, in cases decided after the amendment of 1866. We did not regard this new requirement as jurisdictional; the court had jurisdiction of the case, whether this notice, in that *particular*, was defective or not; nor did we believe that this proceeding arising in a justice's court was to be construed with penal strictness; and we cordially adopt the language of the Court of Appeals, that "liberality in the construction of this statute to attain the purpose, should always be indulged, especially in a justice's court proceeding;" that the notice is sufficient if it gives the respondent notice of the *particular* complained of, in the amount of the judgment. It is then for the respondent to correct it. The opinion of the Court of Appeals is but the same doctrine that was laid down in *Fox v. Nellis*, and *Loomis v. Higbie*. The amendment of this section, in 1866, must have been fully and duly considered by them; for the language of that amendment is contained in the opinion they have given.

While we would advise the profession in bringing this class of appeals, to observe greater caution by following more closely the language of the statute, and not to adopt the notice in this case as a *good* precedent, we hold that the notice, nevertheless, was sufficient.

The result is that the judgment of the county court of Columbia county, so far as it adjudges costs to the plaintiff, is reversed and the said judgment modified, and restoration ordered, according to the order entered with the clerk at the city of Albany.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, November 12, 1872.
P. Potter, Parker and Daniels, Justices.]

GEORGE I. KNIGHT *vs.* ORVILLE H. FORWARD.

It was not the intention of the legislature, by the sections of the Revised Statutes relative to fraudulent sales of goods and chattels, (3 R. S. 222, §§ 5, 6, 5th ed.,) to provide that after a sale of personal property, it might not at any time pass into the possession of the vendor, without raising the presumption that the sale was made with intent to defraud creditors.

When it appears that property has passed into the hands of the vendor for a mere temporary purpose, and under circumstances which show that the return of the possession was not with a view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor are not authorized to attack the sale as fraudulent and void.

Where, upon the sale of a cutter by a son, to his father, there was an immediate change of possession, but the father occasionally allowed his son, the vendor, to use the property, and after use, it was again returned to his possession; *Held* that the change of possession was continued, within the meaning of the statute; and that there was no presumption of fraud, against the sale.

Where a fraudulent intent cannot, under the circumstances, be presumed, against a purchaser, it is not necessary for him to disprove such intent. If the facts proved are such as to carry the question of fraud, in a sale, to the jury, and they have found against it, their finding is conclusive.

The acts and declarations of a vendor, in respect to the property sold, after the sale, are not competent evidence to impair or destroy the purchaser's title.

A witness can only be impeached as to material evidence.

Evidence which goes to show that a witness has given versions, out of court, of the transaction to which he is testifying, essentially different from, or wholly inconsistent with, the truth of the evidence given by him, is admissible on the ground that his reputation for truth and veracity is directly assailed.

It is competent to examine a witness as to contradictory statements made by him, and to contradict him if he denies having made them.

A vendor of property, being examined as a witness to prove the sale, was asked, on his cross-examination, whether he had not, at a time subsequent to the alleged sale, offered to sell the same property, as the owner thereof, to another. This question was objected to, and the objection sustained. *Held* that this was legitimate cross-examination, and the party was entitled to the witness' answer; and that the court erred in rejecting the evidence.

THIS action was brought in a justice's court, to recover for the conversion of a cow, cutter, sulky and harness. On the trial the sulky was withdrawn. The answer was a general denial; under which the defendant justified the taking, as deputy sheriff, under and by virtue of a judg-

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ment and execution in favor of the Black River Bank against J. R. Knight and the defendant, Forward. Knight was the principal debtor, and the sheriff levied by direction of Forward. On the trial the taking of the property was admitted by the defendant, and its value was proved. The cause was tried before the justice and a jury. The plaintiff obtained a verdict, and judgment was rendered, by the justice, in his favor, for \$31.36, damages and costs. From this judgment the defendant appealed to the county court of Jefferson county, where the judgment was affirmed; and the defendant appealed to this court.

F. W. Hubbard, for the appellant.

I. The plaintiff deriving his title to the property from J. R. Knight, his son, and the execution debtor, was bound as against a creditor, to show that he purchased the property in good faith, and for a sufficient consideration. This he did not do. The plaintiff knew that his son was involved in debt, and no doubt the intent was to absorb or cover up all his property, to keep it from creditors. J. R. Knight says: "My father proposed the sale consummated in writing; he wanted I should let him have all the property I could," &c. When the intent is so apparent, we insist that the plaintiff must give clear proof of his being a creditor, or purchaser in good faith for value, in a contest with another creditor concerning the property. The property, when levied on, was in J. R. Knight's possession, and practically had always been in his possession. He could not prove his title, except through the bill of sale. The burden was on him to show his actual title, having no possession. Under these circumstances, the recital, in the bill of sale, of the indebtedness from J. R. Knight to the plaintiff, although good as between them, was not sufficient evidence as against a creditor. If the plaintiff had such a note as recited, he could have produced it. The plaintiff failed to show himself a creditor of his

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son, or that in good faith he paid any consideration for the purchase of the property.

II. J. R. Knight was a witness for the plaintiff, and testified to the sale of the property in question to the plaintiff, at the date of the bill of sale, February, 1859. On his cross-examination, he was asked this question: "About two years ago next November, in Brownville, on the road going to Alexander Moffatt's, did you tell the defendant that you dare not own property in your own name, and that you had executed a bill of sale to your father, for the purpose of covering up your property from a judgment obtained against you on a claim in Philadelphia, or words to that effect?" This question was objected to as immaterial, and as too uncertain as to time and place. The objection was overruled, and the witness answered, "I do not think I did." The bill of sale had then been given in evidence, and was distinctly referred to in the question. The object of the question was impeachment; and the same question was put to the defendant, and the justice excluded the answer, under objection of the plaintiff. It is presumed that it was excluded on the ground that the question was too uncertain as to time and place. If so, it was error, for the time and place are both stated distinctly. It was equally error to exclude it on the ground that it did not pertain to the merits of the case. The answer would have contradicted the witness, in a vital particular of his testimony directly on the merits. He had sworn that he had sold the property to the plaintiff. The evidence offered was to show that he had stated out of court substantially that he had not. This was material to the issue. (1 *Greenl. on Ev.* § 462, and cases cited. 1 *Cowen & Hill's Notes*, 509, 533, ed. of 1839. *Newton v. Harris*, 6 *N. Y.* 345.) On the defense, this question was put to J. R. Knight: "Did you, about a year ago last September, in the village of Brownville, offer to sell the cutter and harness in question to the defendant, as your

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property?" The answer was excluded under a general objection of incompetency and immateriality. The same question was put to the defendant, and the answer excluded. The ruling of the justice was erroneous. The defendant was entitled to the answer, which would show the act and declaration of J. R. Knight directly inconsistent with his testimony. We were entitled to the answer of Knight, even if we could not contradict him, on the ground of its being collateral to the issue. We, however, think it material. The whole matter of the pretended sale was a fraud, and hence the tenacious objection to that species of proof, which would have tended to disclose it. It may further be observed, that these declarations were made by J. R. Knight, when he was in the actual possession of the property, and his claim of ownership would have thoroughly impeached his testimony with the jury. The justice excluding the proof he did, the defendant forbore to give much evidence which he could have given, and among other things, the general bad character of the plaintiff. It cannot be urged that there was evidence enough, aside from that of J. R. Knight, to sustain the judgment. It is enough that the plaintiff did not prove, first, title to the property, or a *bona fide* purchase for a sufficient consideration; and, second, that competent and important evidence was excluded.

III. The question of justification, under a general answer, cannot be raised on this appeal. The objection, if taken in the court below, could have been obviated by amendment of the answer. (4 *Seld.* 204. 2 *id.* 345. 2 *Kern.* 481, 486. 16 *Barb.* 643. 4 *E. D. Smith*, 276.)

Wm. H. Browne, for the respondent.

I. The plaintiff derived title to this property from his son, J. R. Knight, under the bill of sale, which was admitted in evidence. The property mentioned in this paper was delivered to the plaintiff at the time of sale,

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and the amount was credited on the note mentioned. The plaintiff was a holder for value. In his cross-examination, he says: "I paid fully for the note mentioned in paper A," [the bill of sale.] The cow in question was purchased in July, 1861; was delivered to the plaintiff, and he had paid for her. The defendant, without a single fact to contradict this statement, claims the transaction was fraudulent as against the creditors of J. R. Knight, and yet, at the time of the transfer of the property by J. R. K. to the plaintiff, in 1859, the debt upon which judgment was recovered, and on which the property in question is attempted to be taken, did not exist, nor until some two years after. 1st. Fraudulent intent is a question of fact, and not of law. 2d. The appellate court will set aside a verdict on a question of fraud, only when it is against evidence; where there is no valid consideration to support it; or where the facts shown are otherwise, *per se*, conclusive evidence of fraud. (6 *Hill*, 433. 4 *id.* 271. 11 *Wend.* 241.)

II. It was incompetent, as a defense to the action, to ask the witness, J. R. Knight, whether he offered to sell the harness and cutter as his property. Anything he might have said, or could say, after he had parted with his title to the property, could not affect the rights of the plaintiff. It was incompetent for any purpose; if for impeachment, it was too indefinite; and no object being stated for what purpose the evidence was intended, the ruling was correct. The same reason applies to the subsequent offers to prove that J. R. Knight had offered to sell the property; and the further reason that neither of these questions had been put to the witness J. R. Knight, as was necessary, if they were competent for impeaching purposes. It was also incompetent under the answer, the defendant not having set up any justification to excuse the taking of the property. The most that can be urged in regard to the ruling of the justice upon these questions, is that the evidence tended to discredit the evidence of

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the witness, J. R. Knight. Leave his evidence entirely out of the case, and it is supported by clear and positive evidence, and nowhere contradicted. So far as we know, the jury did so; at least they did not base their verdict upon his estimate of the value of the property.

III. The county court, in affirming the judgment, decided the case as the right demanded, without regard to technical errors. It was the duty of the court so to do. (*Code*, § 366. *Bort v. Smith*, 5 Barb. 283, 285, and cases there cited.)

By the Court, MULLIN, J. The action before the justice was trover, for the value of a cutter, sulky, harness and cow. The sulky was withdrawn, on the trial. The answer was a general denial of the complaint. The defense insisted on was fraud in the sale of the property in question from J. R. Knight to his father, the plaintiff; and as against the said J. R. Knight, a judgment and execution, by virtue of which the said property was seized and sold. The defendant was the owner of the said judgment.

It appeared on the trial, that in February, 1859, a bill of sale of the property in question, with other property, was made and delivered by said J. R. Knight to the plaintiff to apply, as stated in the paper, in payment of a note given by said J. R. Knight to one Nathan T. Knight for \$223.42, and which was then held by said plaintiff. This bill of sale covered the cutter. The cow was sold to the plaintiff, as alleged, in July, 1861, by said J. R. Knight, for \$26, to apply on a debt due him from the firm of Tremaine & Knight, of which said J. R. Knight was a member. The levy was made on the 5th of September, 1861. The judgment against J. R. Knight was 31st August, 1861. When the levy was made the cutter was in a barn owned by Tremaine, but occupied by the firm of Tremaine & Knight. The cow, in the absence of evidence

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to the contrary, must be presumed to have been in the possession of the plaintiff at the time of the levy.

The plaintiff and his son both testify that the property covered by the bill of sale, and the cow, were delivered to the plaintiff, but that J. R. Knight used the property mentioned in the bill of sale, occasionally. At the time of the sale, in February, 1859, the debt for which the judgment against J. R. Knight was recovered was not contracted, nor does it appear that he was then unable to pay his debts. The plaintiff testifies that he knew he and his son owed debts, and he wished to save himself. He further says he paid fully for the note mentioned in the bill of sale. If this evidence is susceptible of the construction that the son was insolvent at the time of the sale, and that the plaintiff knew it, and made the purchase with the view of defrauding the son's creditors, it was for the jury to draw it. They have not drawn it, but on the contrary have found the sale free from fraud; and this must be held conclusive, unless there is some exclusion of evidence which has prevented the question of fraud from being fully presented to the jury.

Upon whom rested the burthen of proof? Was it on the plaintiff to disprove the fraudulent intent, or for the defendant to prove it affirmatively?

The cutter and sulky were sold in February, 1859, in part payment of a note. At that time the defendant was not a creditor. The property was put into the hands of the plaintiff, and the son permitted to use it occasionally. The statute (3 R. S. 222, § 5, 5th ed.) declares that every sale by a vendor, of goods and chattels in his possession or under his control, unless accompanied by an immediate and followed by a continued change of possession of the things sold, shall be presumed fraudulent and void as against the creditors of the vendor, and shall be conclusive evidence of fraud, unless it be made to appear on the part of the person claiming under such sale, that the same was

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made in good faith, without intent to defraud such creditors or purchasers. Section 6 provides that the term creditors, as used in the preceding section, shall be construed to include all persons who shall be creditors of the vendor at any time while such goods and chattels shall remain in his possession or under his control. Is the defendant a creditor, within the meaning of the statute? Was it the intention of the legislature to provide that after a sale of goods and chattels, they may not at any time pass into the possession of the vendor, without raising the presumption that the sale was made with intent to defraud creditors? It seems to me not. When it appears that property has passed into the hands of the vendor for a mere temporary purpose, and under circumstances which show that the return of the possession was not with a view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor are not authorized to attack the sale as fraudulent and void. In this case, it would seem, the father occasionally allowed his son, the vendor, to use the property, and after use it was again returned to his possession. The change of possession was immediate, and was continued, within the meaning of the statute; and there was no presumption of fraud against the sale. This applies to the cutter.

The cow was transferred by a subsequent sale. She was taken in part payment of an old debt. There is no evidence that she has ever been out of the possession of the plaintiff. As to the cow, therefore, there is no ground to allege fraud in the sale. It was a fair question whether the cow was not sold after the levy by the sheriff. The plaintiff says he bought the cow of his son about the 20th or 23d of July. J. R. Knight says: "I bought her (the cow) of William Martin, and when she was delivered to my father, Mr. Welsh told me he had levied upon the property in question." The deputy sheriff says: "Shortly after the levy on the property in question, I went to the plaintiff's

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house, and the plaintiff said he had a paper showing that he had bought some of that property of Randolph. The plaintiff did, on this occasion, show me the writing. I asked for it. Randolph said he wanted to see the plaintiff first, and went and saw him first, and then opened the door and told me to go in." If I understand the evidence of J. R. Knight, it is that it was after the levy that he delivered the cow to his father. The statute (3 R. S. 649, § 13, 5th ed.) declares that whenever any execution shall be issued against the property of any person, his goods and chattels situated within the jurisdiction of the officers to whom such execution shall be delivered, shall be bound only from the time of the delivery of the same to be executed. Section 16 declares that the title of any purchaser in good faith of any goods or chattels acquired prior to the actual levy of any execution, without notice of any such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed before such purchase was made. The plaintiff says he purchased in July; his son says he delivered the cow after the levy, which was on the 5th of September. It was for the jury to say which they would believe, and they have found for the plaintiff.

There was nothing in the case, therefore, that rendered it necessary for the plaintiff to disprove a fraudulent intent, as no such intent could, under the circumstances, be presumed against him.

If the facts proved were such as to carry the question of fraud to the jury, they have found against it, and their finding is conclusive.

The only remaining question is, whether any error was committed in the reception or rejection of evidence on the trial.

J. R. Knight was asked, on cross-examination, whether he did not, about a year ago last September, in the village of Brownville, offer to sell the harness and cutter in ques-

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tion to the defendant, as his (witness') property. This question was objected to, and the objection was sustained. The question called for the acts and declarations of the witness as to the property after he had sold it to the plaintiff. These acts and declarations were not competent to impair or destroy the plaintiff's title. They were utterly incompetent on the merits of the controversy. They could be used only for the purpose of affecting the credibility of the witness, either by his own answers or by the evidence of others called to show that he did make the offer mentioned in the question, should he deny it.

A witness can only be impeached as to material evidence. (1 *Cowen & Hill's Notes*, 726 to 728.) It is not unfrequently quite difficult to determine what is, and what is not, material evidence, or within the rule which admits of witnesses being called to impeach a witness by showing that he has made declarations or done acts, out of court, inconsistent with his statements made on oath in court. It has been held by the Court of Appeals that evidence which goes to show the state of feeling of the witness toward the party against whom he is called, is material within the rule referred to. (*Newton v. Harris*, 6 *N. Y.* 345.) The meaning of which is, that if the witness is influenced by passion or prejudice, the jury should know it, in order that they may the better estimate the weight to be given to his evidence. His veracity is affected. It seems to me the same considerations should admit evidence going to show that the witness has acted or given versions of the transactions to which he is called, out of court, essentially different from, or wholly inconsistent with, that testified by him. Indeed, the Court of Appeals has held, in *Patchin v. The Astor Mu. Ins. Co.*, (13 *N. Y.* 268,) that it is competent to examine a witness as to contradictory statements made by him, and to contradict him if he denies having made them. The offer to sell by the witness, J. R. Knight, made after he knew he had sold to his father,

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was wholly inconsistent with the truth of the evidence given by him, and his reputation for truth was directly assailed. His want of truth cannot be shown, unless witnesses are permitted to be called against him. It seems to me, therefore, that the defendant should have been permitted to put the question which was objected to and rejected, and to have shown by other witnesses that he did make the offer, if he denied it. But if I am wrong in supposing that he might contradict the witness, still I entertain no doubt but that he had the right to have the question answered, although he may not have had the right to contradict him. It was legitimate cross-examination, and the party was entitled to the witness' answer. If he admitted making the offer, the defendant had accomplished his object. If he denied it, the answer would conclude him. I am of opinion that the justice erred in rejecting the evidence, and that the judgment of the county court and of the justice should be reversed.

[OSWEGO GENERAL TERM, July 14, 1868. *Allen, Mullin, Morgan and Bacon, Justices.*]

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PHILO C. ELLENWOOD vs. DAVID FULTS.

In an action upon a lost note, the plaintiff, himself, testified, on the trial, that he let the makers take and show the note to a neighbor, to see if an indorsement thereon was right; that they were gone some time, and one of them returned in about three hours, and said he had lost the note; and the witness testified that he had not seen it since. *Held* that on this evidence, it was fair to infer that the maker who consulted a neighbor as to the validity of the indorsement, acted not only for himself, but for the other maker; and that the statement made by him on his return, was admissible against the other maker, and the jury might find, upon that evidence, that the note was lost.

A note for \$500 was given to the plaintiff by the defendant and his son C., in part payment for a scow, purchased by C. of the plaintiff. When it matured, C. had sold the scow to H. and taken a personal mortgage conditioned to

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pay the note. It was then agreed between the plaintiff and C., subject to the defendant's approval, that if C. and the defendant would give a new note for one half the amount due upon the old, and procure a release from H. of all claims against the scow, and one half of all other claims, the plaintiff would pay one half of all such claims, other than those of H., take back the scow and surrender the \$500 note. This being communicated to the defendant, was assented to by him, with this qualification; that the defendant should guaranty the new note for one half the amount of the \$500 note, and sign an agreement in relation to the payment of the claims on the scow. The new note was drawn by the plaintiff and signed by C., and a guaranty not expressing any consideration was signed by the defendant, and an agreement made, by him, to pay charges against the scow; and the plaintiff indorsed the amount of the new note on the \$500 note.

Held, 1. That the new agreement was substituted for the old note; and if the defendant had fulfilled that agreement, on his part, he was relieved from liability on the \$500 note. That if he had not, then he was liable, upon the new agreement, for whatever damages the plaintiff had sustained thereby. And that it was only in the contingency that the defendant broke this contract that the plaintiff could be remitted to his remedy on the \$500 note.

2. That giving the agreement to pay the charges on the scow was a performance of the clause of the new contract in relation thereto.
3. That the plaintiff was entitled, under the contract, to a valid guaranty of the new note; and the defendant was not released from liability if the plaintiff, through mistake, failed to draw a guaranty binding in law.
4. That the fair construction of the contract being that the defendant should not only sign a guaranty, but one that could be enforced in law against him, the only effect that the plaintiff's mistake could have would be to excuse the defendant from liability for a breach of contract, until demand was made upon him to execute a valid one, and refusal to comply.
5. That the defendant being a joint debtor with C. upon the \$500 note, when negotiations were entered into to pay that debt, they were entered into to pay his own debt, and not the debt of another. And the defendant being thus legally liable, before signing the guaranty, for the whole debt, he was therefore guarantying his own debt, and not the debt of another person. And the guaranty was valid and binding, although it expressed no consideration.
6. That from the plaintiff's omission, throughout the trial, to allege that the scow had not been returned to his possession, and from the allegation of a breach of another and different clause of the contract, the court was bound to consider the case as if a delivery of the scow to the plaintiff had been proved.
7. That the plaintiff, having received and retained a part of the consideration of his promise to release the defendant from the \$500 note, he could not keep it and still recover the whole amount of such note.

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8. That he was entitled to recover only so much as he had lost through the default of the defendant to fulfill his part of the agreement. And that was limited to the new note; all the rest having been performed. That that note, and the interest thereon, formed the measure of damages.

A PPEAL, by the defendant, from a judgment entered at a special term, on the verdict of a jury.

The complaint was on a promissory note for \$500, alleged to have been made by the defendant and his son Chauncey Fuhs, to the plaintiff, dated April 24, 1860, at 19 months; due November 24, 1861. The note was alleged to be lost. The answer denied the making of the note, &c., and alleged settlement and discharge. The son Chauncey had assumed to sign the defendant's name to the note in question, to secure the plaintiff for part of the purchase money of a scow bought of him; part being paid down, and a mortgage given for the balance, the amount of the note. Chauncey had sold the scow to one Holdridge, who gave a mortgage by which he was to pay the \$500 note. The defendant denied the authority of the son to sign his name to the note; and the plaintiff gave evidence that he acknowledged he gave such authority, and the defendant to the contrary. Prior to August 27, 1861, Chauncey had arranged with the plaintiff to take back the boat and indorse the note down one half, on being indemnified against certain claims on the boat. On that day the parties met, the matter was discussed, and the arrangement finally made, the note indorsed down and agreement perfected, except that Chauncey took the note to carry to a neighbor's to see if the indorsement was right. He afterwards returned saying he had lost it; when it was arranged that a new note should be made for one half the amount of it with the defendant's guaranty, and his guaranty against the aforesaid claims. And so the note and guaranty was given, and the business closed.

The guaranty not expressing any value, the plaintiff

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afterwards called on the defendant to insert it, which he refused. Thereupon this action was brought.

On the trial, before the plaintiff rested, he produced to the court a bond in due form, such as is customary in the case of a lost note, with a surety which was approved by the justice holding the court, by indorsement thereon, and filed by the clerk; and which remains on file for the security of the defendant.

At the close of the plaintiff's evidence, the defendant moved the court to nonsuit the plaintiff on the following grounds:

"1. That there is no sufficient proof of the loss of the note in question.

2. That the note was extinguished by the new agreement between the parties of the 27th August, 1861, and the surrender of the vessel, and the only claim of the plaintiff, if he had any, was for the amount of the new note, and the action, if any, must be thereon. That if the note was ever valid against the defendant, the new agreement and guaranty were valid against him.

3. That if that note had a valid existence and was lost, the plaintiff could not maintain the action, without first tendering the bond required by the statute, which must be preliminary to the commencement of the action. The court overruled the motion and the defendant excepted to the decision.

The court charged the jury, 1. That if they believed that David Fults gave Chauncey Fults authority to sign the note, or subsequently recognized it as an existing obligation against him, he would be liable upon it as upon an original signature by himself. The defendant excepted. 2. The obligation of this note could be discharged by an agreement of the parties evidenced by instruments valid in law, and capable of enforcement against both defendants. The agreement made by the parties in August, 1861, necessarily implied that the instruments to be given

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should be valid instruments capable of legal enforcement against the parties. 3. The guaranty of the note and the accompanying agreement were not legally enforceable against David Fults, but, as to him, were without a consideration and void. (To this the defendant excepted.) And the fact that the papers were drawn by the plaintiff, does not, under the circumstances existing in the case, estop him from averring their invalidity. To this the defendant excepted. 4. The consequence was, that the liability of the defendant upon the \$500 note was revived, and the plaintiff was entitled to recover upon it, upon offering and tendering to the defendant the note with the guaranty and accompanying agreement, and placing them at his disposal. To this the defendant excepted. And if the jury should find that such offer and tender were made before the commencement of the action, the plaintiff had performed that condition and was entitled to recover the amount of the note, \$500, and interest, amounting to \$574.08. To this the defendant excepted.

The defendant requested the court to charge that if the \$500 note was genuine, the plaintiff agreed to take the new note and guaranty, and the agreement, and give up the old note, on a sufficient consideration; the defendant was bound by it; that was a valid agreement, and the old note discharged, or at least reduced one half, and the credit extended to the maturity of the new note. The court refused so to charge, and the defendant excepted. Also that the amount was, by the transaction, reduced one half and the plaintiff could recover no more. The jury found for the plaintiff for the whole amount of the note.

W. C. Thompson, for the appellant.

I. There was no evidence against this defendant of the loss of the note. As to Chauncey, his confession might bind him, but not the defendant. If it can be said that he acted on that assumption, it does not prove the fact.

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He could not have had it; and when the loss is called in question, it must be proved.

II. If the defendant did not authorize his son to sign his name to the note—in other words, if it was a forgery—there is no element of recognition in the case to bind him. It was or was not a forgery; and that was the question. If it was a forgery, then there was no consideration for any promise growing out of it. The only case in which any liability can grow out of an unauthorized using of one's name, is where it is repeatedly allowed without question, and therefore grown into an agency implied; or becomes the ground of an estoppel. No such element exists here. And, so far as this case is concerned, the only question was, whether authority was given, or not. Hence that part of the charge, which says that if the defendant recognized the note as a subsisting obligation, he would be liable upon it, was erroneous.

III. If there was a valid note, the defendant became the debtor of the plaintiff, even if he was surety for his son, of which, however, there is not one word of proof; and without it, he was a principal debtor. In fact the plaintiff has nothing to do with the question of surety, as between the makers of the note. It is the defendant's note to pay; and hence the guaranty was that of his own debt, and did not need words of consideration, either in that, on the note, or in the agreement against claims. It needed no written guaranty whatever, any more than did the old note indorsed down. The plaintiff agreed to take the boat and allow so much, and the defendant agreed, in consideration thereof, to pay the balance, and free it from claims. The boat was thereby given up, and the plaintiff accepted and has got it. (*Barker v. Bucklin*, 2 Denio, 45, 57. *Brown v. Curtiss*, 2 Comst. 225. *Durham v. Manrow*, Id. 533. *Hall v. Farmer*, Id. 553. *Partridge v. Colby*, 19 Barb. 248.) And even were he, as between himself and son, a surety conceded and in form, it is the same thing

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to the plaintiff; an oral promise to pay it will bind him. (*Rexford v. Brunell*, 1 *N. Y. Legal Obs.* 396.) In short, the case proceeds on the ground that a man cannot bind himself by a verbal promise to pay his own note. It is enough, however, to say, that neither the plaintiff nor defendant alleged any suretyship. The defendant said he did not make the note, and the plaintiff said he did, and proved it. This is all of suretyship there is in the case. (21 *N. Y.* 336.)

IV. The plaintiff having accepted the new note on a good consideration, and at longer time than the old one, the old one is extinguished.

V. If not extinguished, the plaintiff can only recover the one half. The plaintiff agreed to take back the vessel, and allow one half the note for it, in consideration that the defendant would agree to pay certain claims upon it. The defendant agreed to it; the agreement to do so was binding, though oral. It was an executed agreement on both sides, and the debt therefore reduced one half. The giving of the new note and guaranty did not make it the less an executed agreement, or destroy the effect of the indorsement.

VI. If the plaintiff can be allowed to repudiate it, it can be only on terms of placing the parties where they were, by returning the boat. If the defendant was in fact surety, he would have the right to be subrogated to the plaintiff's lien. . As it now stands, the defendant is made to pay for the boat and lose it besides.

F. W. Hubbard, for the respondent.

I. The evidence of the loss of the note was sufficient. The arrangement of the 27th of August, 1861, proceeded on the theory of the loss; all parties acted on that supposition.

II. The bond to indemnify against the lost note was given on the trial, and approved by the court. This was

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sufficient, under the statute. (2 R. S. 691, §§ 106, 108, 5th ed.) It is not necessary that it should be given before suit. The bond is to be approved by the court in which the trial shall be had. (*Des Arts v. Leggett*, 5 Duer, 156.) The party has the right to require the indemnity before payment, but he may waive it and obtain it on the trial. He may, perhaps, require it at the commencement of the suit; if he does not, he waives it till the trial. The statute simply requires indemnity before recovery.

III. The evidence was sufficient of the execution of the note by the defendant, or that he gave Chauncey Fulta authority to sign it for him. The plaintiff took the note on the representation of the defendant, that he gave or authorized the note. The defendant subsequently recognized the note.

IV. The agreement by which the \$500 note was to be relinquished, was that Chauncey should give a new note for \$273.97 and pay off certain claims on the scow. The defendant's undertaking was to guaranty the payment of that note, and that Chauncey would discharge the liens on the same. The defendant, although in form a maker, was merely a surety for his son on the \$500 note. His agreement necessarily implied that the guaranties should be valid on their face, legally enforceable as such, without resort to extraneous proof. They were not such, because not expressing a consideration. The arrangement was not, therefore, perfected, and the defendant refusing to perfect it by supplying the defect in the guaranties, the plaintiff has a right to resort to the original note.

V. The defendant practiced a fraud on the plaintiff. He knew that the guaranties, when made, were invalid. He knew that the plaintiff was ignorant of the fact. Common honesty demanded that he should have informed the plaintiff and removed his misapprehension.

VI. The guaranties are within the statute of frauds, and void. The relation between the defendant and Chauncey

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Fults was that of principal and surety. This was the form of the relation, under the agreement of the 27th of August, 1861, and was the substance of the relation under the old note. Chauncey was the principal debtor of the plaintiff. This was known to all parties.

VII. The guaranties were not legally enforceable as such. The case of *Brewster v. Silence* (4 *Seld.* 207) is directly in point, and also holds that parol evidence is not admissible to supply a consideration. It also holds that a consideration cannot be found in the fact that the guaranty is made at the same time and on the same paper as the original note, and that it formed an essential ground of the credit given to the principal debtor; that the writings cannot be read together as one instrument, for the reason that they are different and distinct contracts. (*Church v. Brown*, 29 *Barb.* 486.) It is submitted that a guaranty is within the statute, provided the relation of principal and surety exists, and the liability is sought to be predicated on that relation. There is a class of cases where a consideration, in fact, is shown to sustain a liability, but in all such it is founded on a liability as an original debtor. (*Brown v. Curtiss*, 2 *Comst.* 229. *Barker v. Bucklin*, 2 *Denio*, 45.) The consideration finds its root in a matter distinct from the liability of the principal debtor. In this case there was no such consideration; the old debt belonged to Chauncey to pay; and in no just sense can it be said that the new arrangement was a method by which the defendant paid his own debt, or became a principal debtor.

VIII. It is, however, insisted that the question of the statute of frauds is not involved in this appeal. As before observed, the arrangement by which the plaintiff agreed to give up the \$500 note, was not executed. That arrangement, as the justice at circuit held, necessarily implied a valid guaranty on the part of the defendant; and we say further, it necessarily implied that it should be valid on its face, and enforceable as a guaranty of the debt of

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Chauncey without resort to proof *aliunde*. This guaranty not being of that character, the consideration for the plaintiff's promise failed, and he did not lose his remedy on the original note.

IX. The agreement to relinquish the \$500 note having never been executed, the plaintiff was entitled to recover the whole amount of that note. There is no ground for holding that he is limited in his recovery to the one half. No part of the agreement made on the 27th of August was executed. A valid guaranty was not made; nor was the vessel taken back by the plaintiff, or liens on it paid. Substantially, the parties stand in the position they did before the agreement was made.

By the Court, MULLIN, J. There was a conflict of evidence as to whether or not the defendant ratified the act of his son in signing his (the defendant's) name to the \$500 note, and the finding on that question must be held conclusive.

The defendant moved for a nonsuit, on the ground that there was no sufficient proof of the loss of the note. The court denied the motion, and the defendant's counsel now insists that the judge erred in denying the motion. The loss of the note is alleged in the complaint and denied in the answer. The plaintiff was therefore apprised that he must prove the loss by legal evidence. To prove the loss, the plaintiff himself testified that he let them (the defendant and his son Chauncey meaning) take and show the note (the \$500 note) to a neighbor to see if the indorsement (of one half the amount due thereon) was right. "I let Chauncey have the note; they were gone some time, and Chauncey returned in about three hours and said he had lost the note, and I have not seen it since." This is all the evidence in regard to the loss, at the time the plaintiff rested. It is the declaration of Chauncey, and as a general rule his declarations would not be evidence against

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the defendant. But it will be seen that Chauncey and David were both participants in the proceedings to effect a settlement of the \$500 note. They were both parties to that note, and interested in the settlement—particularly in having it indorsed down so as to protect *them*; Chauncey and David have the note to take to a neighbor to see if the indorsement was right. "They were gone," he further says, and Chauncey returned, &c. It seems to me that on this evidence it is fair to infer that Chauncey acted, in consulting a neighbor as to the validity of the indorsement, not only for himself but as agent for the defendant, and that his statement on his return was admissible against the defendant. And the jury might find, on this evidence, that the note was lost. The defendant himself, when examined in his own behalf, swears to the same statement of his son, as to the loss. I think the learned justice rightly refused to nonsuit the plaintiff on this ground.

This brings us to the principal question in the case; whether the \$500 note was satisfied by the new agreement made on the 27th of August, 1861.

The \$500 note was given in part payment for a scow purchased by Chauncey Fults of the plaintiff. That note was dated on or about the 24th of April, 1860, and payable with interest 19 months from its date. The note matured in November, 1861. Chauncey had sold the scow to the Holdridges and taken from them a personal mortgage conditioned to pay the \$500 note. The plaintiff, for some reason, became uneasy in regard to his note, and desired some new arrangement as to it. Negotiations were consequently had with Chauncey in which, it would seem, it was agreed between them, subject to the defendant's approval, that if Chauncey and the defendant would give a new note for one half the amount due upon the old, procure a release from the Holdridges of all claims against said scow, and one half of all other claims, the plaintiff would pay the other half of all such claims other

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than those of the Holdridges, take back the scow and surrender the \$500 note. This proposition was communicated to the defendant and assented to by him ; the only variation in the arrangement being that the defendant was to guaranty the note for one half the \$500 note, and sign an agreement in relation to the payment of the claims on the vessel. The new note was drawn by the plaintiff and signed by Chauncey and a guaranty thereof signed by the defendant, and an agreement made to pay charges against the scow ; the plaintiff indorsed the amount of the new note on the \$500 note, and left. Strough, a witness on behalf of the defendant, says that after these things were done the plaintiff declared himself satisfied. To complete this arrangement it was of course necessary that the scow should be given up to the plaintiff, and neither then nor subsequently was any complaint made by the plaintiff that the scow had not been delivered. The plaintiff, on the trial, is silent on the subject, and it therefore seems to me that we must assume, for the purposes of this case, that the scow was delivered. The plaintiff proves the new agreement, testifies as to performance by the parties, and it was only in the contingency that the defendant broke this contract that the plaintiff could be remitted to his remedy on the \$500 note. Proof of a breach by the defendant was a part of his case. The breach relied on is the invalidity of the guaranty of the new note, not the non-delivery of the scow. From the omission, throughout the trial, to allege that the scow was not returned to the possession of the plaintiff, and the allegation of a breach of another and different clause of the contract, I think we are bound to consider the case as if a delivery of the scow to the plaintiff had been proved.

The defendant performed his part of the new agreement, when he signed the new agreement to pay the charges against the scow, and surrendered her to the plaintiff, except giving a valid guaranty of the new note, if it

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be true that the one given is not, in law, binding upon him.

Before proceeding to examine that question, let us ascertain whether it was the intention of the parties that the note signed and guarantied, and the scow delivered up, the agreement to pay the charges on her, executed by the defendant and delivered to the plaintiff, constituted full performance on the part of the defendant; or whether the \$500 note was not to be deemed paid until the charges were in fact paid, in addition to the performance of the other considerations of the contract. The payment of these charges was demanded by Moon at the time he called on the defendant before suit was brought, and hence I infer that the giving of an agreement to pay was not deemed to be a performance of the contract.

No such position can be maintained. When the acts above enumerated were done by the defendant, they were accepted as performance of the contract. The plaintiff says the \$500 note was to be held to the extent of one half of its amount till the charges on the scow were paid. In this I think he is mistaken. The one half of the note would be no more available to him than the agreement required by the defendant to pay the charges, and no other witness testified to any such provision. Again; it seems that during the negotiation it was proposed to indorse the old note down to one half its amount, and to let the other half remain available to the defendant, instead of taking a new note. But the plaintiff was not satisfied with the old note, by reason of the doubt as to its being binding on the defendant, and hence the new note for the one half was given. And according to the testimony of Strough, it was after the loss of the old note, and the consequent discharge of the defendant from liability thereon, as the plaintiff then supposed, that upon the completion of the new arrangement, he expressed himself satisfied therewith.

It seems to me, therefore, that the new agreement was

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substituted for the old note, and that if the defendant has, in law, fulfilled that contract on his part, he is relieved from liability on the \$500 note; and if he has not, then he is liable upon the new agreement for whatever damages the plaintiff has sustained thereby. And I repeat, that giving the agreement to pay the charges on the scow, was a performance of the clause of the new contract in relation thereto.

The plaintiff was entitled, under his contract, to a valid guaranty of the new note; and the defendant is not released from liability if the plaintiff, through mistake, failed to draw a guaranty binding in law.

The fair construction of the contract is, that the defendant should not only sign a guaranty, but one that could be enforced in law against him. The only effect that the plaintiff's mistake could have, would be to excuse the defendant from liability for a breach of contract, until demand was made upon him to execute a valid one, and refusal to comply.

Is the guaranty, in law, binding on the defendant?

In considering this branch of the case, it must be assumed, on the finding of the jury, that the defendant did execute, and was liable upon, the \$500 note. As between the plaintiff and defendant, the latter was indebted to the former in the amount of the note. It was the debt of the defendant as well as of his son Chauncey. It is true the defendant was a mere surety, as between himself and his son. But the defendant's relation to the plaintiff was not affected thereby. He was a joint and several debtor with his son upon that note.

When negotiations were entered into to pay that debt they were entered into to pay his own debt, and not the debt of another. The cases of *Brewster v. Silence*, (4 Seld. 207,) *Church v. Brown*, (29 Barb. 486,) and divers other kindred cases referred to by the counsel, have no application to this case. In those cases the defendants were in no way responsible for the debt until they signed their

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respective contracts of guaranty. In this case the defendant was legally liable, before signing the guaranty, for the whole debt, and was therefore guarantying his own debt, and not the debt of another. *Brown v. Curtiss* (2 Comst. 225) lays down the rule which governs this class of cases; and until the doctrine of that case is overruled, this guaranty must be held valid and binding.

But if we are wrong in this, still the judgment in this case could not be sustained. The plaintiff had received and retained a part of the consideration of his promise to release the defendant from the \$500 note. He could not keep it and still recover the whole amount of the note. He was entitled to recover only so much as he lost through the default of the defendant to fulfill his part of the agreement. That was limited to the new note; all the rest had been performed. That note and its interest formed the measure of damages.

I am of the opinion that two of the defendant's exceptions to the judge's charge were well taken, and the judgment should be reversed, and a new trial granted; costs to abide the event.

[OSWEGO GENERAL TERM, July 14, 1863. *Allen, Mullin, Morgan and Bacon*, Justices.]

CLARK vs. COTTRELL.

One of several heirs bought out the interests of his co-heirs in the lands descended, taking a separate deed from each, in the same form. The widow of the ancestor having a right of dower in the land, and then occupying, without admeasurement, a certain thirty acres which was called her dower, the heirs in deeding to the purchaser, for the purpose of reserving to the widow her said dower, each made a reservation of such dower in these words: "The party of the first part reserves out of the above described land one-fourth of 80 acres of said land that was set off to" the widow "as her

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right of dower or power of thirds." *Held* that the reservation was of the dower right, and that the grantee took the whole premises, subject to the right of dower, and not merely two thirds.

THIS was an action to recover the possession of one-fourth part of 30 acres of land situate in Denmark, Lewis county.

From 1814 to 1833, Gardiner Cottrell, father of the defendant, owned 100 acres of land in Denmark, and he died about the year 1833. His children were four, viz: Lewis, Ardelia, Albert and Sally. Soon after the old man's death, Lewis, the defendant, bought out the rest of the heirs, taking a deed in the like form from each. Ardelia had married Elisha Saxton, and they, by their deed, sold out to the defendant, in May, 1834. As the widow had a dower right in the land, which the heirs could not convey, and as she then occupied, without admeasurement, a certain 30 acres, which was called her dower, the heirs, in deeding to Lewis, for the purpose of reserving to their mother her said dower, and not to assume to convey what they did not then own, each made a reservation of such dower in these words: "The party of the first part reserves out of the above described land one-fourth of 30 acres of said land that was set off to mother as her right of dower or power of thirds." After this the land became valuable under the respondent's cultivation, the building of canals, &c. In 1854 the plaintiff procured Ardelia to quitclaim to him the same 100 acres which she had conveyed to the defendant in 1834. The widow died in December, 1861, and soon thereafter this suit was commenced. By it Clark seeks to eject the defendant from $7\frac{1}{4}$ acres of the land, under Ardelia's deed to him, which she had conveyed to Lewis more than 20 years before, and which Lewis, for all that 20 years, had occupied. The court held that the deed to Lewis of May, 1834, was a bar to this action, and nonsuited the plaintiff. The plaintiff, on exceptions, moved for a new trial.

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C. D. Adams, for the plaintiff.

Starbuck & Sawyer, for the defendant.

By the Court, MULLIN, J. I do not see how this case can be distinguished from *Swick v. Sears*, (1 Hill, 17.) In that case, as in this, the whole farm was in terms conveyed to the defendant. In both, the reservation was of an undivided part of the land covered by the widow's dower. And the court held that the reservation was of the dower right, or in other words, a conveyance of the whole farm subject to the life estate of the widow. And that upon the determination of that estate, the defendant was absolute owner of the whole farm. The learned justice who delivered the judgment of the court in *Swick v. Sears* seems to consider that if the reservation in the deed was to be construed without regard to the circumstances in reference to which the reservation was inserted in the deed, the title of the plaintiff would have been valid. But construing the reservation clause in the light of surrounding circumstances, it was impossible not to see that it was the intention of the grantors, in that case, to convey the whole farm subject to the right of dower; and that it was not the intention to reserve any estate in the premises to the use of the grantors. The circumstances which led the court to this conclusion were that the grantors owned the land subject to the right of dower; that if he had designed to convey but two-thirds of the land, language more expressive would have been used; and that the reference in the reserving clause to the dower right, shows that the parties had that interest in their minds when the clause was written; and that it was such interest and no other that was intended to be reserved. To which considerations may be added the further one, that it is out of probability that the purchaser would buy a farm from which would be reserved a portion unlocated, and which

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when located might seriously impair the residue. These considerations apply in all their force to the case in hand, and render necessary the same construction of the deed in the case that was given in the case cited.

The whole interest of the grantor in the farm is conveyed, excepting an undivided portion of the part set off to the widow. This interest the grantor did not own, and could not convey. That interest his own protection required to be excepted or reserved. There would seem to be no reason for excepting any other part of, or interest in, the premises. It would seem to be the interest of the parties that the title to the whole farm should pass; and there is no reason shown why it was important to the grantors to except the fee in the part set apart to the widow. With a satisfactory reason apparent for excepting the life estate of the widow, and none for excepting any other interest or share of the estate, it would seem to be giving effect to the intention of the parties, to hold such interest, and no other, reserved by the deed.

As was said by Justice Bronson in *Swick v. Sears*, if the intention had been to grant but a portion of the premises, the granting part of the deed would probably have contained words expressive of such intent, instead of commencing with words conveying the whole estate and then ending with a reservation of part of it.

In the case of *Swick v. Sears* the dower of the widow would seem not to have been set off; in this case it was set off to her by the heirs. I do not perceive how this difference between the cases affects the construction of the deed. If it would affect the case, it would be to give force to the construction of the deed in question. In the case cited, the grantor could not except any specified part of the land, because the dower had not been admeasured or set off, and because an undivided third part must be excepted. In this case, the dower having been set off, it was practicable to except a specific part of the land by

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metes and bounds or other description, rendering certain the part intended to be reserved. But if it was the intention to reserve the life estate only, it was of no moment whether the part to which such interest attached was or was not described. An intention not to convey the life estate was all that was necessary to the validity of the deed and the protection of the parties. For these reasons, I am of opinion that the plaintiff was properly nonsuited, and that the motion for a new trial should be denied.

ALLEN, J., dissented.

New trial denied.

[ONONDAGA GENERAL TERM, January 5, 1864. *Mullin, Allen, Morgan and Bacon* Justices.]

WILLIAM A. GILBERT and others, assignees &c., vs. HIRAM PRIEST and others.

State courts have jurisdiction of actions prosecuted by assignees, appointed under the United States bankrupt act, to set aside conveyances made by the bankrupt when insolvent, and within four months before the filing of the petition in bankruptcy against him, with a view to give a preference to one of his creditors, who had reasonable cause to believe such bankrupt was insolvent and that the conveyance was made in fraud of the provisions of that act; although the cause of action is one created by the act of congress.

THIS action was tried at the Jefferson special term in November, 1871, and was prosecuted by the assignee in bankruptcy of Melancthon Inman, to set aside a conveyance executed by Inman when insolvent and within four months before the filing of the petition of bankruptcy against him, with a view to give a preference to one of his creditors, having reasonable cause to believe he was insolvent, and that such conveyance was made in fraud of the provisions of the United States bankrupt act.

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It was insisted, on the trial, that the State courts had no jurisdiction of the action, for reasons stated in the opinion.

A. J. Brown, for the plaintiffs.

W. C. Thompson, for the defendants.

DOOLITTLE, J. This action is prosecuted by the assignee in bankruptcy of Melancthon Inman, to set aside a deed of certain premises, situate in the county of Jefferson, where Inman resided, executed by the said Inman and his wife to the defendant Hiram Priest, one month before Inman was adjudicated a bankrupt, on the ground that the deed was void, under and by virtue of section 35 of the bankrupt law.

The alleged right of action is one created by that law, and it is objected that this court has no jurisdiction of the action. The allegation is that the federal courts have *exclusive* jurisdiction of such cases by virtue of article 3, sections 1 and 2 of the constitution of the United States, and the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States."

It is well settled that sections 1 and 2 of article 3 of the constitution of the United States do not, *proprio vigore*, give to the federal courts *exclusive* jurisdiction of all cases to which the judicial power of the United States is thereby extended. (*Delafield v. The State of Illinois*, 2 Hill, 159, 162-171; *affirmed*, 26 Wend. 209. *Teall v. Felton*, 1 Comst. 537, 545. *Dudley v. Mayhew*, 3 id. 18. 1 Kent's Com. 395, &c.)

The courts of this State have jurisdiction of questions arising between persons within their territorial jurisdiction, whether they arise under the laws of any other State or any foreign nation.

If they arise under the laws of the United States, they

have the same jurisdiction, unless deprived of it by some competent authority. The fact that the federal courts may have jurisdiction of the same question does not deprive the State courts of jurisdiction. The federal and State courts may, and do have concurrent jurisdiction of various questions.

When, however, the right of action is created by an act of congress, it being a matter within the powers conferred upon the federal government, congress may prescribe, in the exercise of its rightful powers, the manner and the tribunal in which alone that right may be enforced. (*Teall v. Felton*, 1 *Comst.* 545.)

Congress may confer exclusive jurisdiction in these cases upon the federal courts; but, when it does not prescribe the tribunal in which alone they are to be prosecuted, the federal and State courts have concurrent jurisdiction over them. The patent laws of the United States have been determined by the court of last resort in this State, to confer exclusive jurisdiction upon the federal courts over certain controversies arising under those laws. They are cases where the cause of action is created by those laws, and the remedy is prescribed therein to be by action in the federal courts, and these courts are authorized to grant relief, which it is not in the power of the State courts to grant. (*Teall v. Felton*, 1 *Comst.* 537, 543, &c. *Dudley v. Mayhew*, 3 *id.* 9, 18. 2 *Kent's Com.* 368, and note. *Parsons v. Barnard*, 7 *John.* 144. *Gibson v. Woodworth*, 8 *Paige*, 132. *Burrall v. Jewett*, 2 *id.* 134, 145. *Rich v. Atwater*, 16 *Conn.* 409. *Middlebrook v. Broadbent*, 47 *N. Y.* 443.) Congress may, in terms, confer jurisdiction on federal courts of certain actions, and not design to, or in fact, confer on them *exclusive* jurisdiction. When congress has the power to confer exclusive jurisdiction on the federal courts, the question is, whether the act in question, fairly construed, in fact confers it on them. In the case of *Teall v. Felton*, before cited, the court, at page 545, say, in cases

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where the law of the United States prescribes the remedy, and there is no *exclusive* grant of jurisdiction to the federal courts, and the State courts are so organized as to afford redress, it may be obtained in them.

The federal and State courts were held to have concurrent jurisdiction of causes of action created by, and arising under, the bankrupt act of 1841, although that act, in express terms, conferred jurisdiction of the same causes on federal courts. The circuit and district courts have only such jurisdiction as congress confers upon them. (*U. S. Const.*, art. 3, § 1; art. 1, § 8, *subd.* 9. 1 *Kent's Com.* 364, and note a.) They would not have concurrent jurisdiction with the State courts of actions like this, unless congress conferred that jurisdiction on them.

The bankrupt act constitutes the district courts of the United States courts in bankruptcy, and prescribes the manner in which the proceedings are to be prosecuted therein to adjudicate the bankruptcy and distribute the bankrupt's estate, and confers on them certain powers that no other courts possess.

That proceeding is designed to affect claims and rights held by persons residing in any part of the United States, in and outside of the territorial jurisdiction of the courts of any particular State, and the proceedings are such as no State court is adapted or authorized to entertain and perfect. Of these proceedings courts in bankruptcy have exclusive jurisdiction, but of actions of law or in equity, springing out of that law, no *exclusive* jurisdiction is, in terms or by implication, conferred on that court. The general doctrine is stated by Chancellor *Kent* in his *Commentaries*, in these words: "State courts may, in the exercise of their original and rightful jurisdiction, incidentally take cognizance of cases arising under the constitution, the laws and the treaties of the United States. Congress may deprive the State courts of that jurisdiction in every case in which the subject matter can constitutionally be

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made cognizable in the federal courts, *and without an express provision to the contrary*, the State courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter." (1 *Kent's Com.* 397, 400.) These views seem to be in accordance with those of the framers of the federal constitution.

Alexander Hamilton, in discussing the provisions of that instrument in relation to the judicial department, in the eighty-second number of the *Federalist*, while its adoption by the people of the States was under consideration, stated: "I hold the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal, and I am even of an opinion that *in every case* in which they are not excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts give birth. This I infer from the nature of judicial power, and from the general genius of the system. The judiciary power of every government looks beyond its own local and municipal laws, and in civic cases lays hold of all the subjects of legislation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.

The inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, when it was not expressly prohibited."

The action of congress, in which were many of the framers of the constitution, in the adoption of the judiciary act of 1798, was based upon this construction of the constitution and its own powers.

The constitution, and laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, and judges, in every State, are bound thereby. (*Const. of the United States*, art. 4, *subd.* 2.)

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If the law of congress gives a right of action to any person, the State courts are bound by it as much as they would be if it was given by an act of the State legislature. If they should decide against the validity of the act of congress, there is an appeal from their decision to the Supreme Court of the United States.

When the possessor of that right of action comes into a state court to enforce it, the fact that he derived it from an act of congress is no answer to its enforcement. The question is, has he a right of action; and if it is conferred by an act of congress, the State judges are bound to declare the existence of the right, and enforce it. State courts, from a very early period, have taken cognizance of such cases as this, and at different times the question, whether they had jurisdiction, has been raised, and their jurisdiction sustained. (*Ogden and others, assignees in bankruptcy &c., v. Jackson*, 1 John. 370. *McMenomy and others, assignees in bankruptcy, v. Ferrers*, 3 id. 72. *Phoenix v. Day and others, assignees &c. of Ingraham*, 5 id. 412. *Winslow, assignee in bankruptcy, v. Clark*, 2 Lans. 377. *Holbrooke, assignee &c., v. The Third National Bank of Buffalo*, 3d vol. *Albany Law Jour.* 290. *Ward, assignee &c., v. Jenkins and others*, 10 Metc. 583. *Wood v. Mann*, *Law Reporter* 1847. *Stevens, assignee, v. Mechanics' Savings Bank*, 101 Mass. 109. 1 Comst. 543.) In the case of *Ward, assignee &c., v. Jenkins and others*, (10 Metc. 583,) arising under the act of 1841, this question was raised and considered by the court. The court say:

"The result to which we come is, that the State courts have jurisdiction in cases like the present. That no exclusive jurisdiction in suits concerning the property of the bankrupt attaches to the courts of the United States, in consequence of the rights of the assignee being acquired wholly under a law of the United States, nor is created by any provisions of the act itself limiting and restraining suits by

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assignees, and requiring them to be instituted exclusively in the courts of the United States."

The case of *Stevens and others, assignees &c., v. Mechanics' Savings Bank*, (101 Mass. 109,) was an action to enforce a right created by the present bankrupt act. The court held this action could be maintained in the State courts, and approved *Ward v. Jenkins*.

There is nothing in the bankrupt act of 1867 which looks to the exclusion of State jurisdiction over those cases which was not contained in the act of 1841. (*See §§ 6 and 8 of that act.*)

Section 8 of the act of 1841 gave the circuit and district courts of the United States concurrent jurisdiction of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt, against any person or persons claiming any adverse interest, or by such person against such assignee touching any property, or right of property of said bankrupt, transferable to, or vested in, such assignee. Sections 1 and 2 of the act of 1867 confer the same jurisdiction upon the same courts in almost the same terms. They do not purport to confer exclusive jurisdiction. Section 1 of the act of 1867 constituted the district courts of the United States courts in bankruptcy, and granted them jurisdiction, in their respective districts, in all matters and proceedings in bankruptcy.

It gives these courts of bankruptcy certain powers which neither the State nor Federal courts possessed before.

Section 6 of the act of 1841 conferred substantially the same jurisdiction on the district courts.

In determining the question whether the bankrupt act confers exclusive jurisdiction, in the cases in question, upon the district court, it should be recollected that the district and circuit courts have no jurisdiction except such as is conferred upon them by congress. The fact that congress confers jurisdiction upon them, neither confers, nor is any evidence congress intended to clothe them

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with, exclusive jurisdiction. It is as consistent with an intent to confer concurrent jurisdiction with State courts, as with an intent to confer exclusive jurisdiction. In the judiciary act of 1789 congress, when it intended to confer exclusive jurisdiction, said so in express terms. It acted on the theory that these federal courts had no exclusive jurisdiction unless congress conferred it. That jurisdiction may be conferred by express terms, or by necessary implication.

The first section of the bankrupt act, from which the district court derives its jurisdiction in these cases, does not, in terms, confer *exclusive* jurisdiction. It confers jurisdiction, and that is all.

It is quite evident the idea of *exclusive* jurisdiction in the district court was not entertained by congress, from the fact that in the very next section it confers concurrent jurisdiction on the circuit court.

Justice Bronson, in *Delafield v. State of Illinois*, (2 Hill, 165,) said: "There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed."

State courts have always possessed jurisdiction over actions at law and in equity, prosecuted by trustees, whether appointed by courts or individuals, to recover property vested in them.

All the property and rights of action of the bankrupt, by operation of the bankrupt act, are transferred to, and vested in, the assignee in bankruptcy, (§ 14;) and by section 16 it is provided, "that the assignee shall have the like remedy to recover all said estate, (the bankrupt's,) debts and effects, in his own name, *as the debtor might have had if the decree in bankruptcy had not been rendered* and no assignment had been made."

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This section not only gives the assignee *the like remedy* to recover the estate, debts and effects of the bankrupt, which he would have had if no bankruptcy proceedings had been instituted; but apparently assuming the jurisdiction of the State courts to entertain actions prosecuted by the assignee, it seeks to compel the State courts to allow the assignee to prosecute, in his own name, therein actions commenced by the bankrupt before the proceedings in bankruptcy were instituted. It provides, "the assignee shall, if he requires it, be permitted to prosecute the action in his own name, in like manner and with like effect *as if it had been originally commenced by him,*" &c.

Section 35 provides that certain sales, payments, transfers and conveyances by the bankrupt, in fraud of the bankrupt act, shall be void, and the assignee may recover the property or the value of it from the person receiving it.

The assignee is thus clothed with all the property, rights of property, and rights of action of the bankrupt, and with the like remedy to recover the same in his own name, that the bankrupt would have had in case no proceedings in bankruptcy had been commenced, and the right to recover property, or the value of it, transferred by the bankrupt contrary to, or in fraud of, the provisions of this act.

It is difficult to see why he has not as good a right to prosecute an action in the courts of this State, to recover his property, that any man has, who has acquired his property under or by virtue of the laws of any one of the United States, or of any foreign country.

The existence of the right to prosecute such actions in the State courts does not impair his efficiency as an assignee, or his power to protect the estate of the bankrupt, but may very materially add to them.

In the notes to section 1 of the bankrupt act in *Bump's Law and Practice of Bankruptcy*, it is stated: "An assignee under the bankrupt law of the United States may sue in

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his own name, in the State courts, to enforce the right of property vested in him by the assignment in bankruptcy, and the courts of the United States have not *exclusive* jurisdiction of such actions"—citing 101 *Mass.* 109; *S. C.*, 5 *B. R.* 252; *S. C.*, 18 *Pitts. L. J.* 275; *S. C.*, 28 *Leg. Int.* 148; *Boone v. Hale*, 4 *A. L. J.* [*S. R.*] 166; 7 *Bush.* 66; 2 *B. R.* 466; 6 *id.* 207. And at page 185 of that treatise, the author, in stating the jurisdiction of district courts over suits at law, in matters relating to bankruptcy, in all cases where such actions constitute the appropriate form of remedy, continues: "Nothing is more common than to find an assignee bringing a suit in the court of bankruptcy against a party who lives in the same district with himself. The State courts have jurisdiction over such suits, without reference to the district where the proceedings in bankruptcy are pending."

The State courts always have exercised jurisdiction over actions between parties within their territorial jurisdiction, to enforce rights which they possess under the laws of the United States, other States, or of foreign powers, except in cases where exclusive jurisdiction has been conferred upon the federal courts in express terms or by necessary implication.

It has been a disputed question whether the congress of the United States could confer *exclusive* jurisdiction on the federal courts, except in cases where the right of action was created by the act of congress. It may be regarded, however, as clear, that the State courts have jurisdiction in all these cases, unless congress has conferred exclusive jurisdiction on some other tribunal.

The case of *Dudley v. Mayhew*, (3 *Comst.* 9,) cited, is not an authority to show that the provisions of the bankrupt act confer exclusive jurisdiction over such cases as this, upon the federal courts.

That was a case arising out of the patent laws, which,

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as above shown, confer, by necessary implication, exclusive jurisdiction on the federal courts. No such implication arises out of the bankrupt law.

My opinion is, this court has jurisdiction of this action.

[JEFFERSON SPECIAL TERM, November 21, 1871. *Doolittle*, Justice.]

WESTCOTT & NORTHRUP *vs.* WILLIAM G. FARGO,
President, &c.

Although a referee does not find a particular fact, in terms, yet if such a finding is deemed necessary to support and uphold the judgment, the court will presume that the referee did find such to be the fact, if the evidence in the case would authorize or justify such finding.

Where a package was received by an express company, for transportation, at its regular place of business, and receipted to the owner, and was put on the shipping-bill, for its place of destination; and after this, the agents of the company could give no account of it whatever, or at least did not, and professed to be unable to do so; *Held* that the very fact that after receiving it in this way, the defendants' agents paid so little attention to the package as to be unable to give any other or further account of it, was sufficient, of itself, to justify a finding of loss by negligence of the company, and even of gross negligence, if that were necessary to create the liability and uphold the judgment.

To authorize a recovery for a negligent loss of goods by a carrier, the plaintiff is not bound to show, affirmatively, how the loss occurred, and that its occurrence was through the defendant's negligence.

The rule is now well settled that a common carrier may limit his common law liability, in certain particulars, and to a certain extent, by express contract with the owner or shipper of goods.

But carriers cannot limit their liability by a mere notice, even though the notice is brought to the knowledge of the person whose property they carry. It must be by express contract.

In cases where a receipt has been given by a carrier, for the goods, containing a clause limiting and restricting his liability, it has generally, if not uniformly, been held that whether such receipt was to be regarded as a contract, depended upon the question whether the owner of the goods, in taking the receipt, knew its contents, or was to be presumed to know them. If he knew, or was presumed to have known, from the nature of the transac-

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tion, the law infers his assent, and makes it the contract between the parties. Otherwise there is no meeting of minds, and no express contract.

Where owners of goods, themselves, furnished the blank receipt which the carriers' agents signed, it having been taken from a book containing blank printed receipts which they had previously obtained from the carriers; *it was held* that such owners must be presumed to have known the contents of the receipt, and to have assented to it.

And the blank, left in the receipt, for the value of the goods, not being filled, and the referee finding that neither the carriers nor their agent who received and receipted the package had any knowledge that its value exceeded \$50, or any notice or reason so to believe; although the receipt contained a provision that unless the value of the package was specified therein, the carriers should not be liable to an amount exceeding \$50; *it was further held* that the referee correctly decided that the package was received to be carried according to the terms of the receipt, and upon the contract of which the receipt was the evidence. And that the defendants were not therefore liable, in any event, beyond the sum of \$50, if the loss fell within the contract, and was covered by it.

Where a loss, occasioned by the carelessness or negligence of a carrier or his agents or servants, is not mentioned, in terms, in the contract, the law will not presume that a loss so occasioned was intended by the parties.

The contract is to be construed most strictly against the carrier, where it rests in a receipt signed by him only; and when it stipulates for a restricted liability in case of loss, it will not be construed to embrace a loss arising from the careless and negligent acts of the carrier or his servants, unless a loss from such cause is provided for, in express and unequivocal terms, in the contract.

And the rule of construction is the same where, by the terms of the contract, the carrier is only to be held liable as a forwarder. The exemption, in such cases, only applies to losses for which the carrier would be liable as insurer, in his capacity of common carrier.

A carrier may, by express contract, exempt himself from liability for a loss arising even from the carelessness and negligence of his servants or agents. But in all such cases, where the exemption for loss from such cause is expressly provided for, in the agreement, it has been uniformly held that such contract had no application to losses occasioned by the fraud or gross negligence of the carrier or his servants and agents; and that the stipulation for exemption only applied to losses arising from want of ordinary care. Where there is no such stipulation in the contract, it must be held that the contract does not relate to losses arising from the negligence of the carrier or his agents.

The same rule is applicable to a stipulation that any claim for loss shall be presented within thirty days from the accruing of the cause of action. The presentation of the claim within the time, and in the manner, specified, is not a condition precedent to the right of action.

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It is no objection to an action against an express company, to recover for a loss of goods entrusted to it for transportation, that the plaintiffs are corporators or members of the company.

APPEAL, by the defendant, from a judgment entered upon the report of a referee.

The action was brought to recover for the value of a package entrusted to an express company, of which the defendant Fargo was president, for transportation, and which was claimed to have been lost through the carelessness and negligence of the company.

Francis Kernan and *Hooper C. Van Vorst*, for the appellants.

Alexander T. Goodwin, for the respondents.

By the Court, JOHNSON, J. As we understand the finding of the referee, the fact is expressly found, that the package in question was lost through the careless and negligent conduct of the express company's agents or servants. He finds that the allegations of the complaint numbered one, two, three and four, are true. The complaint, as it appears in the case, does not contain those numbers, but it was stated upon the argument by the plaintiffs' counsel, and understood to be conceded by the other side, that number four, in the complaint, as it stood at the time of the trial, contained the allegation of loss by reason of the careless and negligent conduct and management of the defendants' agents and servants.

But if such was not the finding in terms, and such finding should be deemed necessary to support and uphold the judgment, the court will presume that the referee did find such to be the fact, if the evidence in the case would authorize or justify such finding. (*Grant v. Morse*, 22 N. Y. 323. *Chubbuck v. Vernam*, 42 *id.* 432. *Rider v. Powell*, 28 *id.* 310.)

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We think the evidence before the referee was abundantly sufficient to authorize the finding of the fact of the loss of the package by the negligence of the defendants. It was received by the defendants at their regular place of business, and receipted to the plaintiffs, and was put on the shipping-bill for its place of destination. After this the defendants' agents can give no account of it whatever, or at least do not, and profess to be unable to do so. The very fact that after receiving it in this way the defendants' agents paid so little attention to the package as to be unable to give any other or further account of it, is sufficient of itself to justify a finding of loss by negligence, and even gross negligence if that were necessary, to create the liability and uphold the judgment.

The defendants' counsel insists that before a recovery can be had for a negligent loss of goods, it is for the plaintiff to show affirmatively how the loss occurred, and that its occurrence was through the defendants' negligence. But, in most cases, and especially in a case of this kind, it would be utterly impossible for the plaintiffs to make any such proof. The goods are exclusively in the possession of the defendants, and the plaintiffs have no access to them, and, presumptively, can give no account of them after delivery, except as they derive information from those having the lawful custody. If they do not and cannot tell, how can the plaintiffs? The defendants ought to know, and the plaintiffs have no means of knowing. If the rule contended for were the true one, there could be no recovery for loss in a vast majority of cases when the recovery depended upon establishing negligence.

Such a rule would be quite too dangerous and too destructive to the interest of all bailors to be sanctioned or countenanced. On this point we are referred to the case of *Cochrane v. Dinsmore*, decided in the Court of Appeals, and not yet reported, and have been furnished with the man-

uscript opinion of the chief justice of that court in the case. But the decision in that case does not sustain the position contended for. In that case it was known, or supposed to be known, how the loss occurred. It was by the burning of the vessel in which the money or property was carried. And the judge charged the jury that unless the defendant gave evidence to show that the ship did not take fire through the negligence of those in charge, the plaintiff was entitled as matter of law to recover. That the burden was upon the defendant to negative the fact of negligence, and to show that there was no negligence in regard to the origin of the fire in the vessel. This was held to be erroneous in point of law, and that the case should have been submitted to the jury upon all the evidence, to find whether the loss was in fact occasioned by the defendant's negligence. That decision does not, as we conceive, affect the case, because here the fact of negligence is found, or is presumed to have been found, from the evidence.

Assuming that the fact of loss by the defendants' negligence is established, are the defendants liable beyond the amount of \$50. The value of the package lost was \$1104.80 cents. The defendants were common carriers, and but for the receipt or contract they entered into on receiving the goods, would clearly have been liable for the full value.

We understand the rule to be now well settled, that a common carrier may limit his common law liability in certain particulars, and to a certain extent, by express contract with the owner or shipper of the goods. (*Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485. *Mercantile Mu. Ins. Co. v. Calebs*, 20 *id.* 173. *Bissell v. N. Y. Cent. R. R. Co.*, 25 *id.* 442. *Parsons v. Monteath*, 13 Barb. 353. *Moore v. Evans*, 14 *id.* 524. *Meyer v. Harnden's Express Co.*, 24 *How.* 290. *French v. Buffalo, N. Y. and Erie R. R. Co.*, 4 *Keyes*, 108.) But carriers cannot limit their liability by

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a mere notice, even though the notice is brought to the knowledge of the person whose property they carry. (*Blossom v. Dodd*, 43 N. Y. 264. *Dorr v. N. J. Steam Nav. Co.*, *supra*.) It must be by express contract. Questions have sometimes arisen whether a receipt given by the carrier for the goods, containing a clause limiting and restricting his liability, operated as a contract to that effect between the carrier and the owner of the property carried under it, as in the case of *Blossom v. Dodd*, just cited. In such cases it has generally, if not uniformly, been held that whether such receipt was to be regarded as a contract, depended upon the question whether the owner of the goods, taking the receipt, knew its contents, or was presumed to have known them. If he knew, or is presumed to have known, from the nature of the transaction, the law infers his assent, and makes it the contract between the parties. (*Blossom v. Dodd*, *supra*.) Otherwise there is no meeting of minds, and no express contract. In the case at bar, the plaintiffs must be presumed to have known the contents of the receipt, and to have assented to it. They furnished the blank which the defendants' agent signed. They had previously been in the habit of doing business with the defendants, and had been furnished with a book containing these blank printed receipts, which they kept, and from which the receipt in question was taken by them and sent to the defendants to be signed when the goods were delivered. The blank left in the receipt for the value of the goods was not filled, and the referee finds that neither the defendants nor their agent, who received and receipted the package, had any knowledge that its value exceeded \$50, or any notice or reason so to believe.

We are of the opinion, therefore, that the referee correctly held that the package was received to be carried according to the terms of the receipt, and upon the contract, of which the receipt was the evidence. The defend-

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ants are not, therefore, liable in any event beyond the sum of \$50, if the loss falls within the contract, and is covered by it. But it does not. Loss occasioned by the carelessness or negligence of the defendants or their agents or servants, is not mentioned in terms in the contract, and the law will not presume that a loss so occasioned was intended by the parties. The contract is to be construed most strictly against the carrier, where it rests in a receipt signed by him only; and where it stipulates for a restricted liability in case of loss, it will not be construed to embrace a loss arising from the careless and negligent acts of the carrier or his servants, unless a loss from such cause is provided for in express and unequivocal terms in the contract. (*Wells v. Steam Nav. Co.*, 8 N. Y. 375. *Stedman v. Western Trans. Co.*, 48 Barb. 97. *Hooper v. Wells, Fargo & Co.*, 5 Am. Law. Reg., N. S., 16, and note to case.)

And the rule of construction is the same where, by the terms of the contract, the carrier is only to be held liable as a forwarder. The exemption in such cases only applies to losses for which the carrier would be liable as insurer, in his capacity of common carrier.

This we regard as a sound and salutary rule of construction. The law seems to be now well settled in this State, that a carrier may, by express contract, exempt himself from liability for a loss arising even from the carelessness and negligence of his servants or agents. But in all such cases, where the exemption for loss from such cause is expressly provided for in the agreement, it has been uniformly held that such contract had no application to losses occasioned by the fraud or gross negligence of the carrier or his servants and agents, and that the stipulation for exemption only applied to losses arising from want of ordinary care. (*Guillaume v. Hamburgh and Am. Packet Co.*, 42 N. Y. 212. *Wells v. The Steam Nav. Co.*, 8 id. 375. *Alexander v. Greene*, 7 Hill, 544.) But here there is no such stipulation, and it must be held that the contract

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does not relate to losses arising from the negligence of the defendants or their agents. The same rule is applicable to the stipulation in respect to presenting the claim within thirty days from the accruing of the cause of action. But beside this, the presentation of the claim within the time, and in the manner there specified, is not a condition precedent to the right of action, and as a limitation it is not set up in the answer. (*Place v. Union Express Company*, 2 *Hilt.* 19.)

It is no valid objection to the action that the plaintiffs are corporators or members of the company. The action is against the corporation. We are, therefore, of the opinion that the judgment is right and should be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 4, 1872. *Mullin, Johnson and Talcott*, Justices.]

THE PEOPLE, *ex rel.* Henry A. Furman, and Henry A. Furman, *vs.* HARRISON CLUTE.

Where an elector votes for an ineligible candidate, with knowledge of his ineligibility, his vote is void. And it makes no difference that all the electors did not have knowledge.

Under such circumstances, the eligible candidate having the greatest number of votes is elected; provided that number is greater than the number of votes cast for the ineligible candidate by electors who did not possess such knowledge.

Such knowledge may be presumed. And where the ineligibility of the candidate arises from his holding a public office, the electors within the territorial limits of such office will be charged with knowledge of such ineligibility.

A supervisor of a town is ineligible to the office of superintendent of the poor. Where a city charter declares the supervisors of the wards of the city shall be "subject to all the provisions of law now applicable to those officers respectively, in the several towns of the State," the supervisors of such wards are ineligible to the office of superintendent of the poor.

The legislature has power to prescribe qualifications for the office of superintendent of the poor.

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Chapter 352 of the laws of 1829, and chapter 80 of the laws of 1858, are constitutional and valid.

Where a statute has been incorporated in the text of the Revised Statutes without legislative authority, a subsequent statute, purporting to amend it, is effectual for that purpose, though it refer to the former act only by its unauthorized numbering as a section of the Revised Statutes.

Chapter 80 of the laws of 1858 was operative as an amendment of chapter 352 of the laws of 1829.

In an action to which the people are a party, costs are not in the discretion of the court.

APPEAL from a judgment entered upon the decision of the court at special term, (*reported 12 Abb. 399, N. S.*), the case being thus :

The action was brought to oust the defendant from the office of superintendent of the poor of the county of Schenectady, and to put the relator in his place. The relator and defendant were opposing candidates for that office, at the general election held in November, 1871. The defendant received the greater number of votes ; the totals being as follows :

For Clute,	2448
“ Furman,	2228
Total,	4676

At that election, the fifth ward of the city of Schenectady constituted one election district, and the vote therein was as follows :

For Clute,	296
“ Furman,	275
Total,	571

At the charter election of the city of Schenectady held in April, 1871, Clute had been elected supervisor for the fifth ward, and by the electors of that ward. He accepted the office and discharged its duties until December 14, 1871, when he resigned. Clute received the certificate, filed his bond, took the oath, and January 1, 1872, entered into the office. Furman also filed his bond, took the oath and claimed the office.

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Upon these facts the court, at special term, decided that neither party was elected; and ordered judgment of ouster against Clute, but refused to give Furman the office, or to give costs to either party.

Judgment having been entered accordingly, both parties appealed.

Alex. J. Thompson and E. W. Paige, for the plaintiffs.

I. Furman was legally elected superintendent of the poor, and is entitled to the office. 1. Where electors vote for an ineligible candidate, with knowledge of his ineligibility, their votes are void, just as if they had voted blanks, or had not voted at all; and, as a necessary consequence, the candidate having the next highest number of votes is elected. The fact of ineligibility alone is not sufficient; none of the cases hold that; but the gist of the rule is the *scienter*. And the knowledge may be presumed; in fact the rule is oftener applied upon constructive notice than actual notice, just as in cases relating to real estate. (a.) This has been undisputed law in England for 300 years, and is therefore the law of this State. (*Const. art. 1, § 17.*) We cite but one case. (*Gosling v. Veley, 7 Q. B., 53 Eng. Com. Law, 437.*) See the judgment of Lord Denham, (pp. 437-440,) because the rule is admirably stated there, and because the other authorities are referred to, either in that case or in those to be cited presently. (b.) The American authorities are as follows: *Cushing's Lex Parliamentaria*, §§ 175 to 180. To the same effect, see *Wilson's Dig. of Parl. Law*, pp. 107 to 114. *Angell & Ames on Corp.* (p. 98, n. 3,) say: "If the Assembly be duly convened, and the majority vote for an unqualified person, after notice that he is not qualified, their votes are thrown away, and the person having the next majority, and not appearing to be disqualified, is duly elected." (*Gulick v. New, 14 Ind. 97.*) By article 16, section 7, of the constitution of Indiana, it was provided that "no person elected

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to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State, other than a judicial office" Wallace was mayor of Indianapolis, elected thereto by the electors of the city. As such he was a judge of the mayor's court, the jurisdiction of which extended over the county. He ran for sheriff of the county, and received the greatest number of votes. This action was brought by his opponent to obtain the office. It was held by the whole court, that the votes cast for Wallace were void—blanks—because all the electors of the county had notice of his ineligibility, since they were within the territorial limits of his office, and that Gulick was elected. In *Carson v. McPhetridge* (15 Ind. 331) the same points were ruled, upon an election for county clerk. (*Hatcheson v. Tilden*, 4 Har. & McHenry, 279.) By the first constitution of Maryland it was provided that there should be two sheriffs to each county, and by section 42, "no person" was "to be eligible to the office of sheriff" unless he possessed a certain amount of property. The plaintiff, at an election which lasted three days, received the greatest number of votes for the office of sheriff. At the beginning of the election he did not possess the requisite amount of property, but he received it at noon of the third day. The election judges gave the certificates to the two candidates who received the next highest number of votes. Held, by the general court, that they were right, since the number of votes cast for the plaintiff after noon of the third day were not sufficient to elect him. (*Commonwealth v. Read*, 2 Ash. 261.) The county treasurer was, by law, required to be elected by the county board, by ballot, when a quorum was present. The county board of Philadelphia county, a quorum being present, proceeded to elect a treasurer. Nine members voted *viva voce* for Thompson, and one member by ballot for Read. It was held by the common pleas that Read was elected by the

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one vote, because the others were nullities. (*See the remarks on p. 273. See also Commonwealth v. Green, 4 Wharton, 521, the remarks of the court at pp. 580, 581.*) *Commonwealth v. Cluley*, (56 Penn. 270,) was a rule on the relation of McLaughlin, against Cluley, to show cause why a *quo warranto* should not issue against Cluley to test his right to the office of sheriff. At the election Cluley had received 19,915 votes and McLaughlin 12,925 votes. The suggestion rested upon the allegation that Cluley was ineligible at the time of the election, but it did not appear that the electors had notice of the disqualification; nor did it appear that if the votes for Cluley were thrown out, McLaughlin was elected. The case turned upon the precise point that inasmuch as it was not alleged that, throwing out Cluley's votes, McLaughlin had a majority, therefore it did not appear that McLaughlin had such an interest in the question as would enable him to contest the election. It is true that Mr. Justice Strong, speaking *obiter*, said that McLaughlin was not elected; but that was correct, for both of the reasons above given, and he then proceeded to say, page 274: "There is more reason for this in England, where the vote is *viva voce*, and the elective franchise belongs to but few, than here, where the vote is by ballot, and the franchise well nigh universal. In those cases the notice was brought home to almost every voter, and the number of electors was never greater than three hundred, and generally not more than two dozen. Besides, a man who votes for a person with knowledge that the person is incompetent to hold the office, and that his vote cannot therefore be effective, that it will be thrown away, may very properly be considered as intending to vote a blank, or throw away his vote."

Without considering or quoting from the very able dissenting opinion of Chief Justice Thompson in that case, we submit that the majority of the court have laid down principles upon which Furman is entitled to the office.

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This question has been discussed at different times in the legislature of Massachusetts, and it has been uniformly decided that votes given for ineligible candidates, where the electors had notice, should be regarded the same as blank votes. In 1843 an effort was made to change this parliamentary rule, and a majority of the committee submitted a report, accompanied by a resolution, to the effect that it was "not in accordance with the constitution and laws for the two branches of the legislature to reject, in making up the count, the ballots cast for ineligible candidates." A minority of the committee submitted an adverse report, saying: "The fact that the votes given for ineligible candidates, when the two houses have met in convention for the purpose of filling vacancies in certain offices, have been rejected from the count, is of long standing; and that no evil has resulted from such practice is, of itself, a sufficient reason why a different rule should not be established. It is time enough to provide a remedy when an evil is found to exist, and not in anticipation of an evil. This, it is believed, is a safe course in all cases.

* * * The practice of rejecting blank pieces of paper, although they may have the form and shape of the actual votes which are cast, is believed to be uniform everywhere. The reason for the rejection of such paper is that it is not a vote given and numbered; that no one is designated who can be elected. It is, however, no less an expression of dissatisfaction to the candidate voted for by other persons, on one side or the other, than it would be if it bore the name of an imaginary being, or a person ineligible. In both cases it is not a vote, and should not so be treated. So far as precedents can be found, the practice of rejecting from the count votes cast for an ineligible candidate is not peculiar to the convention of the two houses in the Massachusetts legislature. It has obtained more or less in the house of representatives of the United States, and the house of commons in Great

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Britain. * * * Inasmuch as the custom has obtained, for aught that appears, from time immemorial, to reject such votes, the undersigned take leave to submit that the proposed resolution of the majority of the committee is uncalled for, and that no further action be had on such order." The house laid the resolution of the majority on the table, thus in effect adopting the report of the minority. (*Cushing's Reports of Contested Elections in Massachusetts*, p. 499.) The subject was again discussed, and the decision reaffirmed, that votes cast for ineligible candidates should be thrown away. In 1849 Mr. Slade was returned as the duly elected representative of the town of Somerset, and his seat was contested, for the reason, among others, that a ballot for Nathaniel Morton, of Taunton, for member of congress, was thrown out by the judges of election. The committee, in their report, declaring Mr. Slade lawfully entitled, discussed this question as follows: "The policy of the law requires that such a construction should be put upon all proceedings at elections as to make such proceedings valid, rather than nugatory. An election is always attended with trouble, inconvenience and expense, and should not be set aside for light or frivolous causes. If votes cast by mistake for persons not eligible are to be counted, then the intention and will of the voter is defeated; if, on the other hand, such votes are wilfully put into the ballot box, the person who thus indicates so clearly his disregard of the value of the elective franchise, that it is only a deserved punishment for his delinquency to deprive his vote of all weight and influence at such election. By so doing a voter is not deprived of any legitimate exercise of his right, because he can always manifest his opposition to any one candidate by voting for some other. In *Rex v. Monday*, (*Coop.* 530,) Lord Mansfield said, the only way of voting against one was to vote for another. Finally, it seems to the committee that there is no reason why a person who votes

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for an ineligible candidate should not be put upon the same footing with one who does not vote at all, as in both cases the parties show a disposition to prevent an election, and both of them show an unwillingness to perform their duty, by aiding to promote those elections which are absolutely essential to the existence of the government. For if every voter refrained wholly from voting, or voted for an ineligible candidate, the result would be the same, no choice; and although it is true that no penalty is attached by law to a neglect of this obligation of voting, yet the obligation is not the less plain for that; and the committee believe it to be a duty too important to be neglected, and too sacred to be trifled with, by voting for fictitious persons or ineligible candidates. * * * The voter who puts into the ballot box a blank piece of paper, as clearly indicates his opposition to all the candidates as he who puts in a vote for an ineligible candidate; and there seems to be no reason why the opinion of the one should not be entitled to consideration as well as that of the other." Report agreed to April 10, 1849. (*See Cushing's Contest. Elec. Cases, Mass. p. 576.*) 2. The electors of the fifth ward knew that Clute was disqualified. (a.) From the evident notoriety of the fact. The result of the English cases is thus stated in *Grant on Corp.* 208: "A disqualification, patent or notorious, at once causes the votes given for the candidate laboring under it to be thrown away." (*See also Male on Elections, 111; Heywood on County Elections, 535; Roe on Elections, 278, ed. 1818; Clerk on Elec. 173, 4.*) And in America, see *Cushing's Lex Parliamentaria, Wilson's Dig. of Parliamentary Laws*, and *Hatcheson v. Tilden*, and the two Indiana cases above cited. No disqualification could be more patent or notorious than this. Clute was representing the ward in the board of supervisors at the time. Every resident or elector who had dealings with that board must go to him. As a ward officer he had certain administrative functions, and

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it was but six months since every elector in the ward had voted either for or against him for the office of supervisor. No one can doubt for a moment but what every elector in the ward knew that he was their supervisor. It is impossible to conceive a stronger instance. (b.) Every constituent, and every one within the jurisdiction of a public office, is bound to know who is the incumbent of that office for the time being. The English rule is given in *Grant on Corp.* p. 109: "When the ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of that office are held in law to know, and are chargeable with notice of such ineligibility." And on page 206 he says, in enumerating instances sufficiently patent to amount to actual notice, "Or where a candidate already held a corporate office considered in law incompatible with the office sought." (See also *Heywood on County Elec.* p. 533; and 1 *Roe on Elec.* p. 279, citing *King v. Blissel*, where Lord Mansfield held the fact of one holding the office of city chamberlain sufficient notice.) (See *Wilson's Dig. of Parliamentary Law*, p. 111.) In *Gulick v. New*, (14 *Indiana*, 100,) Wallace was mayor of Indianapolis, and as judge of the mayor's court an officer of the county; like our justice of the peace, who is elected by a town, but is yet a county officer. It was held by the whole court, that all the electors of the county were chargeable with notice of the fact of his being mayor; that their votes for him were thrown away, and that Gulick was elected. Chief Justice Perkins, in delivering his opinion, page 104, says: "As mayor, he was simply a corporation officer, and, perhaps, necessarily known as such only within the city limits. But he was more than a city officer. He was a judicial officer, a judge of a court, with jurisdiction coextensive with the county limits, created to administer the general laws of the State to the extent of his jurisdiction. In this capacity of judge the people of the county

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were bound to know the disability, as to the right to hold other offices, which his character as judge brought upon him by the constitution and laws of the State." This decision, it will be observed, goes much further than we claim in this case. It is as if we were to argue, that because the authority of the board of supervisors is co-extensive with the county, therefore every elector in the county was bound to know that Clute was a supervisor. The case of *Carson v. McPheteridge* (15 *Indiana*, 331) is on all fours with this. There was a law that one person should not be county clerk more than eight years. During his eighth year, and while holding the office, McPheteridge was a candidate for re-election, and received the greatest number of votes. It was held by the whole court, that, by reason of his holding the office, every elector in the county knew of McPheteridge's ineligibility; that their votes for him were consequently thrown away, and his opponent elected. The rule that persons within the territorial limits of a public office are bound to know who is the incumbent of that office, is universal. The most numerous applications of it are where questions arise of resisting or refusing to assist a public officer. Even courts within the district are bound to take judicial notice of such incumbent, and that of just such an office as this. (*Holman v. Burrow*, 2 *Ld. Raym.* 794. 1 *Greenl. on Ev.* § 6.)

(c.) Electors will be presumed to know every fact in regard to a candidate's qualification, of which they had the means of knowledge, and which they might have ascertained had they pleased, under the rule of 2 *Show.* 300; 1 *Mod.* 87, 300, that "wheresoever no man is bound to give notice, every man is bound to take notice. (*Grant on Corp.* p. 208.) This rule does not proceed upon the belief that an elector does in reality know such facts, but because it is his duty to find them out. The law requires the consummation of an election upon the day fixed, and the public convenience cannot wait upon an elector's mis-

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takes. Every presumption is in favor of a choice. See the quotations from *Cushing's Lex Parliamentaria*, and the Massachusetts cases, above; also all the text books, and the two Indiana cases cited. Opposed to all this mass of authority there is absolutely nothing; not a single adjudged case; not even an *obiter* expression of opinion by a judge. 3. The rules of the common law above stated were adopted and enforced in the colony of New York; the English cases are therefore controlling authorities under article 1, section 17, of the constitution. When Lieut. Governor Leisler was attainted of high treason and executed, in 1689, several of his adherents were attainted at the same time, and kept in prison until released by order of the king in council, with the restriction that they should not leave the colony; among them was one Gerardus Beeckman. In 1694, shortly after his release, he stood for representative for Kings against one Henry Filkin, and received the greater number of votes, (*Doc. relating to Col. Hist. of N. Y., vol. 4, p. 83;*) but Filkin was returned by the sheriff. (*Jour. Leg. Coun. p. 49.*) Beeckman petitioned, and his petition was referred to the attorney-general, because he was disqualified by his attainder. (*Idem.*) The opinion of the attorney-general has not been preserved, but it appears from the extracts from Governor Fletcher's letters contained in an order of the king in council, (*Doc. relating to Col. Hist. of N. Y., vol. 4, p. 83,*) that the petition was rejected, and Filkin sat through that entire assembly. (*Votes and Pro. Gen. Assembly, Col. N. Y., vol. 1, pp. 35, 47, 52.*)

In 1701 the following case occurred, which is thus reported in *Votes and Pro. of Gen. Assembly, Col. N. Y., vol. 1, p. 116.* August 20, 1701. "Ordered, that this house do forthwith take into consideration whether Major Wessels, returned one of the representatives for the city and county of Albany, be qualified according to an act of assembly of this province, entitled, 'An act for regulating elections

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for representatives in general assembly,' &c., and that the same be done in the house. Then the house proceeded to inquire whether the said Major Wessels was qualified to sit as a member of this house; whereupon some persons were called up who informed the house that Major Wessels was an inhabitant in Dutchess county, and this they were ready to depose when called thereto; and then a bond was produced to this house, under the hand and seal of the said Major Wessels, to the high sheriff of the city and county of Albany, which follows in these words."

This was a bond to indemnify the sheriff for fines and penalties which he might be subjected to for returning Major Wessels, if elected, on account of his non-residency.

"Upon the consideration whereof the house was of opinion that Major Wessels was not qualified to be a member of this house according to the aforementioned act.

Thereupon ordered, that the said Major Dirck Wessels be no longer deemed or esteemed a member of the house, but that he be and is dismissed from any further attendance as a member of the house.

Ordered, that the high sheriff of the city and county of Albany be called before this house, he being in town, to produce the poll of his election, that the house may see which of the candidates is the next person that has the majority of voices, for that city and county, for a member of this house, in the room of Major Wessels, who is dismissed this house.

The high sheriff of the city and county of Albany appeared according to order, and delivered to this house 14 papers, containing the poll of his election, and the house proceeded immediately to inspect the same accordingly.

Ordered, that Mr. Morgan, Cornelius Sebring and Mr. Hering be a committee to examine the said poll, and make their report to this house.

The said committee brought in their report as follows :
The committee appointed to examine the high sheriff,

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for the city and county of Albany, his poll for electing representatives to serve in general assembly of the province of New York,

Report, that they have examined the same, and do find that Mr. Ryer Schermerhorn is the candidate that has the next majority of voices in the said poll, and therefore are humbly of opinion that Ryer Schermerhorn ought, according to the usage and custom of this house, to sit in this general assembly in the room of Major Dirck Wessels, dismissed this house, and that he take his place accordingly.

By order of the committee,

CORNELIUS SEBRING, Chairman.

Which was read and approved of.

Ordered, that Mr. Ryer Schermerhorn do forthwith attend this house, and be received as a member of this house, for the city and county of Albany, in the room of Major Dirck Wessels, dismissed this house."

Mr. Schermerhorn thereupon took the oath of office, and was ordered to take his place in the house, as a member; which he did.

In 1745 there was another case. Captain Bradt and Edward Holland were opposing candidates for representative of the township of Schenectady. The sheriff returned Captain Bradt, and Holland petitioned, claiming that he had a majority. That fact, however, depended upon certain questions of fact in regard to the qualifications of voters, June 22, 1745. Holland's petition was referred to a committee. (*Votes and Proceedings of the Gen. Assembly, Col. of N. Y., vol. 2, p. 65.*) July 6, the committee reported that "many matters of fact being alleged, there be a scrutiny before this house," and that testimony be taken before Cornelius Cuyler, Esq., mayor of Albany, and Philip Livingston, Esq., a justice of the peace, "at the house of Anne Beek, in the township of Schenectady," and that the depositions be transmitted to the house. (*Id. p. 70.*) October 29. The depositions having been

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transmitted, the matter was taken up, and the petition of the sitting member heard by counsel, and Col. Morris made a motion that the "controverted qualifications of the electors be first considered;" which was negatived. (*Id.* p. 78.) November 1st. The matter again being taken up, Mr. Lecount offered the following:

"The council for the sitting member having alleged that Mr. Edward Holland, the petitioner, not being an inhabitant of the township of Schenectady, was not qualified, according to the charter of the township of Schenectady and the laws of this colony, to represent the said township in the general assembly. I move that the house may now proceed to the examination of that allegation;" which was carried in the affirmative. And the following was then passed: "Resolved, that Mr. Edward Holland is not qualified, according to the charter of the town of Schenectady and the laws of this colony, to represent the said township in the general assembly." (*Id.* 78.) And the petition was dismissed. It appeared without question that Mr. Holland was a resident of the city of New York. (*Id.* 65.)

4. The judge at special term recognized the weight of these authorities, and acknowledged the law to be as above insisted upon. But he held that there must be notice to all the electors; that notice to a part of them would not operate to throw out their votes unless all the electors had notice, because you cannot separate a part from the whole; that therefore notice to the electors of the fifth ward alone would not operate to throw out their votes, but that we must show notice to the whole county, and as we had not done that, Furman was not elected. We submit that this is erroneous. (a.) In the first place it has been expressly decided to the contrary. In *Rex v. Hawkins*, (10 *East*, 211; *affirmed in the House of Lords*, 2 *Dow*, 124,) only four fifths of the electors who voted for the disqualified candidate had notice, and it was expressly held that unless the number of those who had voted ignorantly was equal to or greater

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than the number who voted for the qualified candidate, he was elected. In the Maryland case, (*Hatcheson v. Tilder*, 4 Har. & McH. 279,) above cited, where the candidate received the necessary amount of property on the third day of the election, it was held that the votes given after he received it were valid, those given for him before, thrown away, and since the votes given after that period were not enough to elect him, his opponents were elected. Chief Justice Chase said, (p. 280:) "The plaintiff can only be entitled to such votes as were given after he received the necessary qualifications, all votes in his favor previous being illegal and void." In the *Cork County case* (*Knapp & Ombler*, 391) the sitting member of parliament was disqualified, and the committee "being satisfied that notice had been given to a sufficient number of the voters to reduce the poll of the sitting member below that of the petitioner," they seated the petitioner. See also cases to the same effect cited in *Corbet & Daniel's Election Cases*, (p. 8, note.) *Arnold on Corporations*, (p. 142,) says: "If the incapacity of the candidate is not announced till after the proceedings at the election have commenced and votes have been taken, the votes given for the unqualified candidate before such announcement, are not thrown away; another candidate, therefore, whose votes upon the whole poll do not exceed in number those votes which were given for the unqualified candidate before notice of his incapacity, will not be considered as duly elected." To the same effect see *Rogers on Elections*, 227, and *Grant on Corporations*, 208, note n; and the language of the cases and text books, generally, is that votes received after notice, are thrown away. (b.) The reason of the rule shows it. It is this: one who votes a blank, or who does not vote at all, must be held to acquiesce in the choice of those who vote for some qualified candidate, because he cannot be allowed to defeat the election; and one who votes for an ineligible candidate, knowingly, or when he ought to have known it,

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does just the same thing as if he had voted a blank. He cannot be allowed to defeat the election in this way any more than in the other. The only way of voting against one, is to vote for another who is eligible. (*Rex v. Foxcroft*, 2 Burr. 1021. *King v. Monday*, Cowp. 537, per Lord Mansfield. *Gosling v. Veley*, 7 Q. B. [53 Eng. Com. L.] 437, per Lord Denham; and the cases and text books previously cited.) It is a matter which is personal with each voter; and it makes no difference, as far as he is concerned, whether the rest of the electors have notice or not; nor in what way, nor for whom they cast their votes. All the authorities speak of votes given after notice as thrown away, or as blanks; as if one gave his vote "for the man in the moon," said Lord Campbell in *Queen v. Coake*, (28 Eng. L. and Eq. 307.)

II. The court at special term erred in not giving costs to the plaintiffs, upon their recovery. Before the amendment of 1862, subdivision 3 of section 304 of the Code read, "In actions of which, according to section 54, a court of a justice of the peace has no jurisdiction." Section 54 provided that no justice shall have cognizance of a civil action in which the people of the State are a party. In 1862, section 304 was amended by omitting the words, "according to section 54." So that, if the rule was changed at all by the amendment, it is the stronger for our argument. But that amendment had no practical effect. (*Staiger v. Schultz*, 3 Keyes, 614.) The "other actions" mentioned in section 306 are simply equity actions. (*Hinds v. Myers*, 4 How. 356.) And this is an action in which costs were always a matter of right, upon recovery. (2 R. S. 613, § 3; 1 R. L. 343, § 4.)

III. Chapter 80 of the laws of 1853 operated as an amendment of chapter 352 of the laws of 1829, and is a valid enactment. 1. The first rule of statutory interpretation is to ascertain the intention of the legislature. *Quod verba intentioni inservire debent.* (*Potter's Dwarries*, pp. 175

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to 180.) In the fourth edition of the Revised Statutes, chapter 352 of the laws of 1829, is inserted as section 22, of chapter 20, title 1, part 1, and is the same section referred to in chapter 80 of the laws of 1853. The original section 22 of that title of the Revised Statutes, related to matters of excise money and penalties. The intention of the legislature is therefore too plain to be mistaken. 2. Admitting that the fourth edition of the Revised Statutes was an unauthorized compilation, it was composed of nothing but laws in force. An amendment of it was therefore really an amendment of a law. 3. Although the fourth edition was originally, an unauthorized compilation, it has been so constantly treated by the legislature as a valid compilation of the laws, that it must be deemed to have been adopted and ratified. See an account of this matter in the introduction to Edmonds' Statutes, page 7. Judge Edmonds there puts a question, whether the repeal of an independent enactment, thus incorporated into the text of these editions, would operate as a repeal of the original law; but he does not question the validity of an affirmative enactment. 4. Chapter 80 of the laws of 1853 is a law enacted by the constitutional authorities, which expressly provides that no supervisor shall be elected superintendent of the poor. And it makes no difference in what way the enactment has been made, so long as there is no doubt about it. 5. The act amends the Revised Statutes. This being so, it is immaterial which edition is amended, so long as that edition does in fact contain the Revised Statutes. It is also entirely immaterial what the amended section previously contained; or what was its origin; or indeed, whether there was ever any such section before, so long as the amending act states clearly how it shall read in the future. Suppose there had been no section 22, will it be doubted but what chapter 80 of the laws of 1853 has created one?

IV. Admitting that chapter 80 of the laws of 1853 is

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invalid, chapter 352 of the laws of 1829 is effective to disqualify a supervisor from being elected superintendent of the poor. The word "appoint" is broad enough in its meaning to include an election.

V. Chapter 80 of the laws of 1853 is constitutional and valid. 1. The statute book of every State in the Union, except Connecticut, contains a law imposing a qualification for an elective office. [Referring to the statutes of the several States.] 2. It is not repugnant to article 1, section 1, of the constitution. (a.) The words "law of the land" mean a pre-existing law. (*Wynehamer v. The People*, 3 Kern. 392-395. *The People v. Quant*, 2 Park. Cr. Rep. 414, and note, p. 687.) (b.) In this action Clute is obtaining "the judgment of his peers." 3. It is not repugnant to article 11, section 1, as restricting an elector's right to vote. (a.) A statute is not unconstitutional unless so repugnant to constitutional provisions that the statute and the constitution cannot stand together. 1. The legislature possesses all the powers of the British parliament, except as restricted by the constitution, either by express provision or "necessary implication." (*Wynehamer v. The People*, 3 Kern. 378, 410, 411, 428-430, 452, 453, 477. *The People v. Draper*, 15 N. Y. 543. *Leggett v. Hunter*, 19 id. 445. *The People v. Morrell*, 21 Wend. 563. *Butler v. Palmer*, 1 Hill, 324. *Bloodgood v. M. and H. R. R.*, 18 Wend. 9. 34 Barb. 137, 138. *The People v. Quant*, 2 Park. Cr. Rep. 412-414.) 2. To nullify a law by "necessary implication," it must be so repugnant to a provision of the constitution that both cannot stand together, or be consistently reconciled. It must frustrate the constitution. (*The People v. Draper*, 15 N. Y. 544, per Denio, J. *Newell v. The People*, 3 Seld. 109. *Fletcher v. Peck*, 6 Cranch, 128. *Ex parte McCollum*, 1 Cowen, 450. *Clarke v. Rochester*, 5 Abb. Pr. 107. 24 Barb. 446.) This is the rule in regard to the repeal of one statute by another by "necessary implication." (*McCool v. Smith*, 1 Black, 459. *Wood v. U. S.*,

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16 *Pet.* 342. 10 *Barr.* 448. *Hartford v. U. S.*, 8 *Cranch*, 109. *Brown v. County Com.*, 21 *Penn.* 37. *Street v. Commonwealth*, 6 *Watts & Serg.* 209. *Bowen v. Lease*, 5 *Hill*, 221. *Williams v. Potter*, 2 *Barb.* 316. *The People v. Demning*, 1 *Hilt.* 271.) And the rule is the same in constitutional as in statutory construction. (*Potter's Dwarries*, 654.)

(b.) But chapter 80 of the laws of 1853 is not so repugnant to article 2, section 1, that both cannot stand together. 1. Article 2, section 1, gives the right "to vote" at an election. But the right "to vote" is unrestricted so long as there are two persons to be voted for. The definition of the word "vote" is as strictly satisfied where there are but two persons to select from, as when the elector can choose from the world. Under the rule given in regard to repugnancy, where a word is susceptible of both a restricted and an extended meaning, and the restricted meaning will satisfy its definition, it may be used if thereby the two laws can be reconciled. It is true that the statute in question restricts an elector's freedom of choice; but the constitution does not give absolute freedom of choice; it gives a right "to vote at an election," simply. 2. This is more evident from the letter of article 2, section 1. It does not give an elector a right to vote for whomsoever he pleases, but a right to vote "for all officers that now are, or hereafter may be, elective by the people," plainly referring it to the legislature to provide both what offices shall be elective, and what persons shall be eligible thereto. 3. The opposing argument proves too much; it leads to an absurdity. Upon the assumption of absolute freedom of choice, an elector may vote for a Hottentot, or an animal, if he please, and the argument must go that length, or it is good for nothing. It must deny the power to the legislature, because, if the power exists, its exercise is discretionary. (c.) The case of *Barker v. The People* (20 *John. top of page* 461) is an unanimous adjudication of the late Supreme Court in our favor. (d.) The opinion of Chan-

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cellor Sanford, in the same case on error, (3 Cowen, 703,) is not authority against us. 1. It is *obiter*; and it is the opinion of the chancellor alone, not the court; because the question put in the court of errors was always, "shall this judgment be reversed," not "shall this or that opinion be concurred in," and a decision of the Supreme Court is of more authority than an *obiter* expression of opinion by the chancellor. 2. The opinion is partly based upon the ground that the constitution prescribed certain qualifications for all offices, and that having been omitted from the present constitution one half of the reason for the opinion is gone. 3. The decision in this case destroys the chancellor's opinion upon this point; in fact we claim the case as an authority in our favor. The case was upon the act which prohibited any one convicted of dueling from being elected to office. Chancellor Sanford says, the legislature has no power to prescribe qualifications for office; but the constitutional grant of "legislature power" has given authority to the legislature to punish crime, and as such punishment it may provide that one cannot be elected to office. But if the power to punish crime comes only from the grant of legislative power, and as an incident of that grant the legislature may prescribe a qualification for office in one instance, it may also prescribe it in another. It follows, therefore, that the grant of legislative power is stronger than the grant of the right of suffrage, and controls that grant, and the prescription of a qualification being an exercise of legislative power, the decision destroys the statement in Chancellor Sanford's opinion. It is an authority against the grant of freedom of choice to the electors, for another reason. The claim that the legislature cannot impose a qualification for office does not rest upon any one's right of eligibility to the office, but upon an elector's right to vote for whom he pleases. Admitting that the legislature can punish Barker for crime, that does not give it the right to take away my constitutional fran-

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chise to vote for Barker, under pretense of punishing him. That would be inflicting punishment upon me. You take nothing from Barker, for he had no right before; but you take from me my freedom of choice. Therefore, this decision can be supported only upon the theory that an absolute freedom of choice is not given to an elector by the constitution. (c.) The statute in question is directly authorized by article 10, section 2, "all county officers whose election or appointment is not provided for in the constitution, shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct." We claim that this section, under the authorities, should be construed as if it read, "shall be elected by the electors of the respective counties as the legislature shall direct." It has been held that the offices and powers referred to in this section were vested by legislative authority, and not by irrevocable constitutional grant; that the legislature has authority to arrange the distribution of such powers as the public exigencies may require, apportioning them to local jurisdictions to such an extent as the law-making power deems appropriate; that this is a continuing legislative power, by virtue of which such powers may be resumed and vested in other authorities; and that the legislature is the sole judge of such public exigencies, "otherwise," said Mr. Justice Denio, "we should have an impossible government." (*The People v. Shepard*, 36 N. Y. 285. *The People v. Pinckney*, 32 id. 377. *The People v. Draper*, 15 id. 544.) Subject to the restriction that the appointment shall remain in the county authorities, the legislature may do what it please. (*Devoy v. The Mayor &c.*, 36 N. Y. 449.) Prescribing qualifications is at worst only altering the appointing power, which is expressly authorized. So that in this view, the law in question is constitutional, even if we admit that, generally, restrictions are in conflict with article 2, section 1.

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VI. A supervisor was ineligible at the adoption of the constitution, and its restrictive provisions are prospective only. (*The People v. Denniston*, 23 N. Y. 247.)

VII. The judgment should be modified by declaring Furman entitled to the office; in other respects affirmed, with costs of the trial and of the appeal.

J. S. Landon, for the defendant.

I. The court erred in holding that the acts of 1829, (*ch.* 352,) and of 1853, (*ch.* 80,) are constitutional and valid. The judge, at circuit, hastily disposed of the objections to the constitutionality of the acts, by asserting that the objections made did not apply to the case. The defendant reasserts them and asks that they may be carefully considered. Chapter 80, laws of 1853, page 115, is unconstitutional. 1. It impairs the right of suffrage, because it restricts the right of the elector to select and vote for a candidate from the whole body of electors. The right of suffrage is guarantied by the constitution. Section 1, article 2, provides that the elector shall be entitled to vote "for all officers, that now are, or hereafter may be, elective by the people." By common consent and universal usage the constitution is so construed that all electors, not disqualified by the constitution itself, are eligible to any office. (*Barker v. The People*, 3 Cowen, 686.) Limitations upon eligibility to office are prescribed by the constitution itself. Thus: The governor must be thirty years of age, and five years a resident of the State. (*Art.* 4, § 2.) State engineer and surveyor must be a practical engineer. (*Art.* 5, § 2.) Justices of sessions must be justices of the peace. (*Art.* 6, § 15.) Judges ineligible to other offices. (*Art.* 6, § 10.) Sheriffs ineligible to re-election. (*Art.* 10, § 1.) Members of the legislature ineligible to certain offices. (*Art.* 3, § 7.) Can it be claimed that any person constitutionally eligible, can be rendered ineligible by an act of the legislature; that what the constitution permits, the

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legislature may deny? The power of the legislature to interfere with suffrage in any case is derived from the constitution itself, and is limited to the following cases: "Laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of bribery, larceny," &c. (*Art. 2, § 2.*) "Laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage, hereby established." (*Art. 2, § 4.*) It is clear from these provisions, that it was the intent of the framers of the constitution to place the right to suffrage above and beyond legislative interference. The power to interfere with suffrage has manifestly been denied to the legislature, except in the cases specified in the instrument itself. This becomes the more apparent when we reflect that this is a government by the people; that the constitution was established to secure the blessings of freedom. (See preamble to State constitution.) The right of suffrage, according to our polity, lies at the foundation of our government. Our theory is, that the constitution did not confer it, because it inhered in the body politic anterior to any written constitution, but the constitution secured it from loss, restriction or invasion. Now if the legislature may say that the citizen elector shall not vote for a supervisor, it may also say that the citizen shall not vote for any other specified class of electors. It may say that no man shall be eligible to any office except the son of the incumbent, and thus secure, under the forms of republican government, fruits of hereditary government. If the legislature may deny eligibility to one, it may to another; to a few, equally so to many; and thus the elector would, in effect, by comprehensive restricting acts of the legislature, be deprived of the right "to vote for all officers, elective by the people." For of what value is the constitutional right to vote, if the legislature may so restrict and hedge it about, as in effect to deny to the elector freedom of choice. 2. The act of 1853

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is unconstitutional, because it denies to the defendant eligibility to office, which the constitution permits. The case of *Barker v. The People*, (3 Cowen, 686,) in court of errors, sustains and illustrates the above principles, and is relied upon as decisive of the case at bar, in view of the fact that the defendant has been guilty of no crime. (See also *matter of John Foley*, 39 How. 356.) The court at circuit sought to evade the force of the above objections, by making these extraordinary and unsupported assertions. "The acts complained of restrict no elector in his vote." It is answered, but for that act the people had the right to vote for the defendant. "Deprive no citizen of any right or privilege secured to him." But for that act the defendant was secure in the privilege of eligibility by permission of the constitution, to the office to which the voice of the people called him. "The offices of supervisor and superintendent were created by statute, and the legislature had the power to declare the holding of one incompatible with holding the other." It may be that the office of supervisor was created by statute, but it is three times mentioned in the constitution, so that its framers were not ignorant of its existence. But both offices are constitutionally made elective by virtue of article 10, section 2. The option was given by the constitution to the legislature to make them elective or appointive, and there is no power conferred by the constitution upon the legislature to deny to any citizen or officer eligibility to the one or the other. Having constitutionally made the offices of superintendent elective, whatever rights the constitution vests in the elector, respecting "all offices elective by the people," vests in respect to this office. The legislature exercised a constitutional right in creating an office and making it elective, but to say it may therefore impose an unconstitutional restriction upon the citizens respecting it, is a consequence not plainly perceived. The inhibition is not against the citizen but against the

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office." To the defendant who is sought to be ousted from office, to which the people called him, these words seem delusive. It is not unlike telling a man who has been hit by a club, that the force of the blow has been sustained by the club, not by his head. The argument of the court below showing the wisdom of the legislation has no force, if the legislature had not the power to so legislate.

II. The defendant was not ineligible, for the reason that he was not a supervisor of a town, but of a ward of a city. The act of 1853 being a disabling act must be construed strictly, and the defendant not falling within the letter of the act, does not fall within the act itself. The law cannot be strained to impose a penalty or disability beyond what its letter will warrant. (1 *Black. Com.* 92, *marg.* *Potter's Dwarrie*, 245.) The expression of a town supervisor is the exclusion of a city supervisor. *Expressio unius exclusio alterius*. It claimed that the charter of Schenectady (*Laws of 1862*, 661, § 8) subjects the defendant to the same disabilities as a town supervisor. It provides that the supervisors of the city "shall be subject to all the provisions of law applicable to supervisors of towns, except as limited by this act or inconsistent therewith." The manifest object of this act is to define the duties of supervisors of the city. It is an enabling, not a disabling act. It is equivalent to saying that, in the performance of their duties, the city supervisors shall be subject to all the provisions of law, &c. Whether the defendant falls within the disability imposed by the act of 1853, is at least a matter of reasonable doubt, and the defendant is entitled to the benefit of that doubt. (*Chase v. N. Y. Cent. R. R.*, 26 *N. Y.* 523. *Potter's Dwarrie*, 245, *note. Id.* 251, 255.)

III. It is denied that there is any law imposing a disability upon the defendant. Chapter 80, laws of 1853, page 115, reads as follows: "Sec. 1. Section 23, of chapter 20,

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title 1, of the first part of the Revised Statutes, 4th edition, is hereby amended so as to read as follows: Sec. 23. No supervisor of any town shall be elected to hold the office of superintendent of the poor." The Revised Statutes were not thereby amended, for the reason that no such Revised Statutes existed. The law sought to be amended forms no part of the Revised Statutes, and never did. Chapter 352 of the laws of 1829, which provides that no supervisor shall be appointed superintendent of poor, never formed part of the Revised Statutes. That act was not amended, because not referred to. The act of 1853 shows an intent to amend a pre-existing law, not to enact a new law. "The Revised Statutes, 4th edition," is a private compilation of two gentlemen. So far as it truly transcribes the Revised Statute, such transcript may be read in evidence. (*Ch. 359, Laws of 1830, p. 53, 3d Edm. ed.*) Their interpolation of other matter into the text of the Revised Statutes could not give such interpolation legislative sanction. The amendment of 1853, therefore, falls, because it has nothing to attach to. To amend a statute which does not exist, is absurd. To amend the act of 1829, without at all referring to it, is equally absurd. Whether it is the duty of the court to sanction legislation of such gross looseness is a matter of doubt, of such gravity as to be deemed reasonable, and the defendant is clearly entitled to the benefit of the doubt. "Where clauses inflicting pains and penalties are ambiguous, or obscurely worded, the interpretation is ever with the subject, for this plain reason, that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed." (*Hebbard v. Johnson, 3 Taunt. 177. Potter's Dwarries, 251.*)

IV. The relator cannot claim to be elected. The law, if valid, does not declare the votes cast to be void, as in the cases mentioned in the constitution. (*Art. 6, § 10. Art. 3, § 7.*) No proof was offered that any voter knew

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that the defendant was a supervisor, or disqualified. The finding of fact (not excepted to) is that the voters did not know of his ineligibility. Surely a finding tending to destroy the highest privilege of a citizen—suffrage—should be based upon affirmative evidence. Our laws provide that the person receiving the greatest number of votes shall be elected. This number the relator did not receive. It is submitted, as conclusive upon this point, that the election was not (granted the validity of the law) void *per se*; it was only voidable, upon an action like this, in the nature of a *quo warranto*. “Due process of law,” i. e., a trial by a competent court, must first be had before the defendant’s ineligibility could be affirmed as a fact. (*Wynehamer v. The People*, 13 N. Y. 378, 392.) On the day of the general election the defendant’s ineligibility could not, therefore, be affirmed as an adjudged fact. The defendant had not then had his day in court, to be heard in the case. The voters surely could not be bound to take notice of a fact which might never be adjudged a fact, and could not be, until the defendant had been heard in court to make his proofs and allegations against it. The votes cast for the defendant in the fifth ward were therefore not void, only voidable. Not being void, they could not be thrown out, or rejected. The relator therefore did not receive the highest number of valid votes. Had the law declared the votes cast for the defendant void, it is possible a different rule would obtain.

V. The judgment should therefore be reversed so far as it ousts the defendant from the office, and his title thereto should be asserted, and affirmed so far as it declares the relator not elected thereto.

By the Court, PARKER, J. This action was brought to oust the defendant from the office of superintendent of the poor for the county of Schenectady, and to put the relator in his place.

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The facts found by the court at special term, are as follows:

"At the general election in 1871, the office of superintendent of the poor was to be filled by the electors of the county of Schenectady.

The relator, Furman, and the defendant, Clute, were both candidates for said office, and were voted for by the electors. The whole number of votes was 4676, of which Clute received 2448, and Furman 2228, (which gives Clute 220 majority.)

Of the votes given for Clute 295 were given in the fifth ward of the city of Schenectady, which then constituted one election district. Clute was declared elected, and having filed his official bond and taken the oath of office, he, on the 1st of January last, entered into said office and still continues therein.

At a city election held in April, 1871, said Clute was duly elected supervisor of the fifth ward, accepted the office and discharged its duties until the 12th day of December last, when he resigned.

Previous to January 1st, 1872, the said Furman took the oath of office and tendered and deposited with the county clerk a bond in due form and sufficiency as superintendent of said county, and claimed the said office.

There was no proof of actual notice of Clute's ineligibility to any of the electors of said county, nor proof of any facts from which notice could be implied, other than his holding the office of supervisor of the 5th ward."

From these facts the court concluded that the election of Clute was void, and conferred upon him no title to said office, and that, inasmuch as no notice to the whole body of electors of Clute's ineligibility was shown, the election was a failure, and neither of the candidates acquired title to the office. Judgment was ordered and subsequently entered against the defendant Clute, ousting him from the office, and adjudging that Furman was not entitled thereto,

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and denying costs to either party. From this judgment both parties have appealed. The ground of the decision that Clute was not eligible to the office is, that being supervisor of the 5th ward of the city of Schenectady he was debarred from holding that of superintendent of the poor, by chapter 352 of the laws of 1829, chapter 80 of the laws of 1853, and chapter 385, title 4, § 8, of the laws of 1862.

The first of these statutes is as follows: "No supervisor of any *town*, or county treasurer shall be *appointed* to hold the office of superintendent of the poor of any county in this State."

This provision was incorporated into an edition of the Revised Statutes, called the fourth edition, as section 22 of chapter 20, title 1 of the 1st part thereof, and it was amended by chapter 80 of the laws of 1853, as follows: "Section 22 of chapter 20 of title 1 of the 1st part of the Revised Statutes, fourth edition, is hereby amended, so as to read as follows: '22. No supervisor of any town or county treasurer, shall be *elected* or appointed to hold the office of superintendent of the poor.'" There can be no doubt that this was an effectual amendment of the provision of law thus incorporated into the Revised Statutes, because there can be doubt of the identity of the provision intended to be amended, and whether it was, in fact, a part of the Revised Statutes, is of no consequence.

By the charter of the city of Schenectady, (*Laws of 1862, ch. 385*,) it is enacted that the supervisors, provided to be elected or appointed under this act, shall be *subject to all the provisions of law* applicable to those officers, in the several towns of this State.

It follows that the defendant, supervisor of a ward in that city, was ineligible to the office of superintendent of the poor.

It is strenuously contended, however, by the learned counsel for the defendant, that the statutes of 1829 and

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of 1853, above quoted, are unconstitutional; that it is not competent to the legislature to restrict the eligibility to office.

In examining the question of the constitutionality of a statute, it is necessary to keep in mind the fundamental principle in regard to the power of a State legislature, that to it is committed by the people "the whole law making power of the State, which they have not expressly or impliedly withheld. Plenary power in the legislature, for all purposes of civil government, is the rule, a prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity, to show that it is forbidden." (*People v. Draper*, 15 N. Y. 543.) There is in the constitution of this State no general provision in regard to eligibility to office, and no express restriction upon the legislature touching that subject. The doctrine insisted upon that the legislature has no power to place any restriction upon eligibility to office is drawn from the guaranty in subdivision 1, article 2 of the constitution, of the right to every male citizen, possessing certain qualifications, "to vote for all officers that now are or hereafter may be elective by the people." It is said that if the legislature may deny eligibility to one, it may to such others as it may choose, and so restrict the right of suffrage in respect to the officers elective by the people, that such right of suffrage will be unconstitutionally limited.

This, it will be seen, is no restriction upon the right guaranteed, which is the right to vote, not to be voted for. True, if the legislature should take away eligibility from all persons for whom the electors could vote, that would be taking away his right to vote and would be unconstitutional. But it by no means follows that it is unconstitutional to declare a single class of persons for whom he could vote, ineligible.

The right which the constitution guaranties to him is
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not thereby interfered with. He may still vote "for all officers elective by the people."

No doubt the absence of any restriction upon the legislature, leaves that body in possession of great power for evil, in the way suggested by the counsel. Still, as the people have given to the legislature all legislative authority, without excepting the power to declare who shall be eligible to office, it is not a function of the courts to make the exception. In the language of Senator Verplanck, (20 *Wend.* 382,) adopted by Johnson, J., in *Wynehamer v. The People* (3 *Kern.* 413,) "It is only in express constitutional provisions, limiting legislative power and controlling the temporary will of the majority by a permanent and paramount law, settled by the deliberate will of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment."

I am unable to see how the act of the legislature, providing that no supervisor shall be elected to hold the office of superintendent of the poor, is unconstitutional.

The court, at special term, correctly held that the defendant was ineligible, and the judgment ousting him from the office was right.

The next question is, was Furman legally elected and entitled to the office?

This was decided in the negative by the court below, on the ground that there was no proof that the electors who voted for Clute had notice of his ineligibility.

There is no doubt that a vote given for an ineligible candidate is to be counted, and not deemed thrown away, if the voter is not chargeable with notice of the ineligibility.

Doubtless the voters of the 5th ward, of which the defendant was supervisor, were chargeable with such notice. This is not denied, but it was held that, in order to give effect to the vote for Furman, as being the majority, and

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sustain his election, it was necessary that all who voted for Clute should be chargeable with the notice that none of the votes given for Clute could be thrown out unless all were, and that Furman, therefore, did not receive a majority of the votes to be counted, and the result was, that as Clute, who did receive the majority, was ineligible, no one was elected.

In this, I am inclined to think, the court erred.

I see no difficulty in separating the votes given for Clute in the 5th ward from those given for him in the rest of the county. These 295 voters in the 5th ward had notice of his ineligibility, the others had not. There is no difficulty, in practice or in principle, in throwing out these 295 votes, while the others are retained and counted. The voters in the 5th ward who voted for Clute, knowing his incapacity to take and hold the office, did no more than if they had voted in blank, voted for no one; that is, had not voted at all; and this is the case with each voter individually who thus voted. That others voted for Clute, supposing him eligible, can have no effect on the vote of one knowing him ineligible, and *vice versa*. In *The King v. Hawkins*, (10 East, 211,) Hawkins and Spicer were candidates and were voted for, for the office of alderman of the borough of Saltash. After two votes had been given for each, it was found, and publicly proclaimed, that Hawkins was ineligible to the office. After notice thus given twenty votes were given for Hawkins, by voters, all but two or three of whom had notice of his ineligibility, and sixteen for Spicer; and it was held that all the votes given for Hawkins after such notice to the voters who gave them, were thrown away, and Spicer was held duly elected. Lord Ellenborough said: "The general proposition that votes given for a candidate, after notice of his being ineligible, are considered the same as if the persons had not voted at all, is supported by the cases of *The Queen v. Boscawen*, *Easter*, 13 Anne; *The King v.*

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Withers, Easter, 8 G. 2; *Taylor v. Mayor of Bath*, M. 15, G. 2; all which are cited in *Cowper*, 537, in *The King v. Monday*.

"Is there any solid distinction between the cases I have alluded to, as establishing the general proposition, and the present case, on account of the notice of the disqualification of Hawkins having been given after two persons had voted? We think there is not; there still remained thirty-six persons to vote, of whom only sixteen voted for Spicer and twenty voted for Hawkins. Although we are not prepared to say that if the notice had been given in a more advanced stage of the poll, it would have made any difference, provided the number of votes given for Hawkins, without notice of his incapacity, had not been equal to those given for Spicer. Spicer having been, therefore, in our opinion, duly elected into the office of alderman, and having been sworn in before two aldermen who have, by the charter, authority to administer the oath, the office was legally filled up and enjoyed by him." And the judgment in this case was afterwards affirmed in the house of lords. (2 Dow, 124.)

Other cases are cited by the plaintiff's counsel, holding the same doctrine in regard to the propriety of throwing out such part of the votes as are affected by the notice, and retaining such as are not, but we are pointed to no case which denies such propriety.

The defendant's counsel, however, argues that, inasmuch as the statute, under which the defendant is ineligible, does not declare votes cast for him void, they are voidable, and therefore a judgment declaring him ineligible was necessary before the fact could be deemed established, and that hence the voters were not bound by the notice of such fact.

The authorities do, in effect, make all votes cast for an ineligible person, with notice of the fact, void, when they declare them, as in *The King v. Hawkins*, (*supra*), wholly

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inoperative as votes, the same as no votes, and hold that to produce such effect, notice only, and not adjudication of the fact is necessary.

If the 295 votes which should have been thrown out are not counted, a majority of seventy-five is left for Furman, and he was elected, and should have had judgment in his favor to that effect.

The plaintiff claims that the judgment is also erroneous in not giving costs to the plaintiff.

By section 304 of the Code, it is provided that costs shall be allowed, of course, to the plaintiff, upon a recovery, "In the actions of which a court of a justice of the peace has no jurisdiction," and in several other cases therein mentioned, not bearing upon the question here.

By section 306 it is provided that "in other actions costs may be allowed or not, in the discretion of the court."

The latter provision has been confined to equity cases, of which the case at bar is not one. (*Staiger v. Schultz*, 3 *Keyes*, 614.)

In this case the relief sought was a judgment of ouster against the defendant, and a further judgment that the relator, Furman, was entitled to the office.

The judgment recovered was one of ouster of the defendant merely, and as to the further relief demanded, it was denied. Still the plaintiff recovered a judgment, and as the action was not one cognizable before a justice of the peace, he was, by virtue of section 304 of the Code, entitled to costs.

The judgment, therefore, in so far as it adjudges that said defendant, Harrison Clute, be ousted from the office of superintendent of the poor of the county of Schenectady, mentioned in the complaint, in this action, must be affirmed.

And, in so far as it adjudges, that the said plaintiff, Henry A. Furman, is not entitled, by virtue of the election mentioned in the complaint, to the said office of superin-

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tendent of the poor, it must be reversed, and judgment must be entered, adjudging that the said plaintiff, Furman, is entitled, by virtue of the said election, to the said office, and that the plaintiff recover, against the defendant, the costs of the action and costs of the appeal.

[THIRD DEPARTMENT, GENERAL TERM, at Binghamton, September 3, 1872.
P. Potter, Parker and Davids, Justices.]

THE PEOPLE, *ex rel.* Mark M. Pomeroy, *vs.* ANDREW H. GREEN and others, constituting the board of apportionment and audit.

The act of 1872 (*ch.* 375, § 2) requires the comptroller of the city of New York, "to allow and pay the bills of the several proprietors of the newspapers in said city and county for all city and county advertising *actually done* prior to January 1, 1872." *Held* that it was not the effect of this provision to legalize all previously illegal demands, and to require the payment of the bills of mere volunteers, the same as those of persons publishing under legal authority; and there was nothing in the act demanding such an interpretation.

That the object of the statute, so far as the newspapers were concerned, evidently was to provide an appropriate procedure, with an adequate fund, for the speedy liquidation and payment of all strictly legal obligations, and also of all just and honest claims of an equitable, if not of a technical legal character.

That there was the fullest intention of providing for publishers who had acted under legal authority, or at least in good faith under color of such authority, but none of presenting any part of the public funds to those who had acted in violation of law, and without a shadow of authority.

Held, also, that as to claims for services done apparently without any contract express or implied, and without any legal authority, or even official request, the allowance of such claims would be pure gratuity, and the court would not, by *mandamus*—a writ which only issues in cases of unquestionable legal right—direct the board of apportionment and audit even to consider them.

But that where services were performed under color of legal authority, and were beneficial to the city, and necessary, they came within the provisions of the act of 1872; and that a *mandamus* would be issued, directing such board to audit and allow the bills for such services.

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THIS was a motion for a writ of peremptory mandamus to compel the board of apportionment and audit to convene and proceed to audit and allow the bills of the relator, for publishing and advertising notices, &c., for the corporation of the city of New York, in certain newspapers known as The New York Democrat, and Pomeroy's Democrat. The bills of the relator were duly presented for payment, to the board, but the board neglected, for several months, to audit and allow the same.

George Norris and Abraham R. Lawrence, for the relator.

John H. Strahan and Edward Pierepont, for the board of apportionment and audit.

Richard O'Gorman, for the mayor, aldermen, &c.

BARRETT, J. The question presented for the consideration of the court is, whether the relator has any legal claim against the city and county of New York, which it is the duty of the board of audit to investigate and settle. The solution of this question depends upon the construction given to the second section of chapter 375 of the laws of 1872. The comptroller is thereby required "to allow and pay the bills of the several proprietors of the newspapers in said city and county, for all city and county advertising *actually done* prior to January 1, 1872."

It is claimed that the effect of the words italicised is to legalize all previously illegal demands, and to require the payment of the bills of mere volunteers the same as of those publishing under legal authority. It would require the most direct and unmistakable language—language susceptible of no other or fairer meaning—to justify the court in imputing a legislative intention to perpetrate such wrong upon our people. There is nothing in the act demanding such an interpretation. Its object, so far

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as the newspapers are concerned, evidently was to provide an appropriate procedure, with an adequate fund for the speedy liquidation and payment of all strictly legal obligations, and also of all just and honest claims of an equitable, if not of a technically legal character. There is the fullest intention of providing for publishers who had acted under legal authority, or, at least, in good faith under color of such authority, but none of presenting any part of the public funds to those who had acted in palpable violation of law, and without a shadow of authority. There are other provisions in the act favoring this construction, such as the distinct reference to the authority of the board of canvassers in connection with the publication of the official canvass, and also the direction not to "audit or allow any claim at a greater rate or amount than that fixed by law, or by a contract under which any services were rendered or materials furnished."

So, too, as to the mode of procedure. The bills are to be read aloud at the time of presentation, entered by the clerk of the board in a suitable book or journal, and laid on the table for five days thereafter for objections.

"All objections" made within the five days are to be duly considered by the board. The words "all objections" are surely broad enough to cover the major as well as the minor, the legality as well as extent of the claim. It is also urged that the general laws of the State in force at the time of the passage of the act afforded adequate remedies for the enforcement of all legal claims, and that therefore the provisions in question are supererogatory under any other than the extreme construction contended for. This view, however, overlooks the fact that even for those whose claims are of undoubted validity, a special fund is provided, with a procedure which contemplates payment within thirty days from the passage of the act. It also overlooks the equitable spirit which pervades the act and which authorizes the board to consider the claims of those

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who, with but doubtful legal right, are yet entitled, having acted in good faith, under color of legal authority, to equitable consideration. Take, for instance, the provision respecting the publication of the official canvasses. Here all publications actually made under the authority of the board of canvassers are legalized and payment required.

Whether the board of canvassers directed such publications without any legal authority, or having a limited authority exceeded their powers, with respect to the number of the newspapers, or the extent of such publications, the innocent proprietor who published *bona fide*, relying on such authority, is protected. It will thus be seen that the act in question was a necessary and just supplement to existing laws, and that the construction which the court puts upon it is in harmony with its purpose and spirit. It remains but to apply these views to the case of the relator.

A large part of the publications for which he claims, viz., those specified in sections C. D. E. and F., annexed to his affidavit, were made apparently without any contract, express or implied, and without any legal authority or even official request. The allowance of such claims would be pure gratuity, and the court will not, by mandamus—a writ which only issues in cases of unquestionable legal right—direct the board even to consider them. A part of the relator's services, however, (viz., those specified in schedules A and B appended to his affidavit,) was performed under color of legal authority; on the 1st of December, 1868, his newspaper was selected by the mayor and comptroller, under chapter 853 of the laws of that year, as one of the journals wherein the proceedings of the common council, and the notices of its committees, should be published. In 1869 there was no legislation on the subject. In 1870 the mayor and comptroller were authorized to designate seven daily and six weekly newspapers for such advertising purposes, and it was declared to be

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unlawful to pay any money for advertising thereafter made or incurred, of any description, for or on account of the corporation, except to such newspapers. (*Laws of 1870, ch. 383.*) No designations were made under this act, and the power thereby conferred remained unexecuted. In 1871 the mayor and comptroller were authorized to designate from time to time nine morning or evening daily, and nine weekly newspapers, to publish such digest of the proceedings of the common council as might be prepared and authorized, under the direction of these two officials. (*Laws of 1871, ch. 574.*) All the newspapers authorized by this act were duly designated, but none of the relator's journals were selected. The advertising specified in schedules A and B was done in 1870, after the passage of chapter 383 of the laws of that year, and solely under the authority of the designation of December 1, 1868. If the work had been done after the designation of the nine daily and nine weekly newspapers under the act of 1871, it would have been plainly illegal, and the court could not have treated it as within even the broad language and equitable spirit of the act of 1872. But it was all done in 1870, without any notice, express or implied, of the revocation of the original appointment, and it may well be, in view of the failure to designate afresh, the absence of any revocation, or other notice of the necessity which existed for some corporation advertising, that the proprietors of the four daily and three weekly newspapers, which had been designated under the act of 1868, thus deemed their appointments to have been continued under the act of 1870. At all events, that part of the work was beneficial and necessary so long as the power remained unexecuted, and was done under color of legal authority; and if the above views are correct, it comes within the provisions of the act of 1872, and is thereby directed to be audited, allowed and paid.

A mandamus must therefore issue, requiring the board

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to audit the claims embraced in the said schedules A and B. It will then be for the board to investigate the details, and satisfy itself that the advertisements were actually inserted and published as charged, and to audit such items as in this view of their legality may be found to be just, but at no greater rate or amount than fixed by law; or by a contract under which such services were rendered. And if there be no express contract, then the board should audit upon the basis of the *quantum meruit*, viz., of an implied contract to pay what the services are reasonably worth. This is a matter within the discretion of the board, and the mandamus will only direct the principle upon which it should act, without interfering with the fullest exercise of this discretion. In all other respects the motion is denied. Let the order be settled upon one day's notice.

[NEW YORK SPECIAL TERM, June 8, 1872. Barrett, Justice.]

HELEN BETTINGER vs. JOHN W. BRIDENBECKER.

No valid trust can be founded upon an interest derived from an illegal contract, or established in contravention of the general policy of the law.

On the 1st of February, 1862, the defendant executed an agreement in writing, under seal, by which he acknowledged the receipt of \$450, from D., to be held by him as trustee, for the period, in the manner and upon the conditions and trusts therein mentioned, or until the trust was revoked. By this agreement, the defendant promised to invest the money, and pay the interest to the plaintiff annually, and that on the 15th day of July, 1864, the said sum of money should be paid to the plaintiff as her own property; *provided* that before that time no proceedings should be instituted against D. on account of any alleged injury to the person or character of the plaintiff, either civil or *criminal*, or in her own behalf, or in behalf of the *people*; and that the plaintiff should execute a release of all demands. It was proved that on the 2d of January, 1862, D. was arrested and held to bail upon a warrant, charging him with the criminal offense of having assisted in pro-

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curing an abortion of a quick child, upon the person of the plaintiff, on the 5th of July, 1861. It was claimed that the consideration of the agreement in question was that such criminal prosecution should be abandoned, until after the statute of limitations had attached.

- Held*, 1. That this agreement being for the suppression of criminal proceedings which had been instituted against D., tended to obstruct and interfere with the administration of public justice and of the laws, and was utterly void.
2. That the plaintiff could not be permitted to prove, in opposition to the express stipulation of the agreement, that it was not a part of the understanding that the criminal proceedings should be abandoned.
3. That the claim that the contract had been executed could not be supported; the action being brought to enforce it, and for that reason the court could not aid the plaintiff; although it would not by any means assist the defendant, should its aid become necessary to enable him either to execute, or to defeat, the trust. MULLIN, J., dissented.

THIS is an action upon an agreement, made upon a settlement between the plaintiff and one Daniel F. Dygert, by the defendant, to pay to the plaintiff \$450, which sum was placed by Dygert in the hands of the defendant, as a trustee, for the use of the plaintiff.

The defense was, that the money sought to be recovered was placed in the defendant's hands upon an illegal agreement, to suppress a criminal prosecution against Dygert for procuring an abortion of a quick child, upon the person of the plaintiff. That Dygert had been arrested, and just before court this money was placed in the defendant's hands to induce the plaintiff not to appear before the grand jury, or prosecute Dygert for the crime.

The issue came on to be tried at the Herkimer circuit, in December, 1864. The plaintiff put in evidence a written agreement, dated February 1, 1862, made by the defendant, under his hand and seal, in these words:

"This is to certify that I, John W. Bridenbecker, have received of Daniel F. Dygert, the sum of four hundred and fifty dollars, in money, to be held by me as trustee, for the length of time, in the manner and under the conditions hereinafter set forth, to wit:

First. The said sum is to be invested by me, according

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to my own judgment, so as to yield the best return in legal interest or profit, and the said interest or profit is to be paid by me to Miss Helen Bettinger, her guardian or heirs, executors or administrators, or upon her order annually, so long as the said sum remains in my hands, and so long as this trust remains unrevoked.

Second. On the 15th day of July, 1864, the said sum of money is to be paid to the said Helen Bettinger, her heirs, executors and administrators, as her own property, to hold and to use in her own or their own right; provided, that before the said 15th day of July, 1864, no prosecution shall in any manner or form be instituted against the said Daniel F. Dygert, on account of any alleged injury to the person or character of the said Helen Bettinger, either civil or criminal, or in her own behalf, or in behalf of the people of the State of New York. And provided also, that the said Helen Bettinger shall, at that time, and before receiving said sum of money, make, execute and deliver unto the said Bridenbecker for Daniel F. Dygert, a good and sufficient release of all demands, actions or causes of action whatsoever, existing in her favor, and against the said Daniel F. Dygert, at the date thereof.

In witness whereof I have hereunto set my hand seal, this the 1st day of February, 1862." (Signed by the defendant.)

The defendant proved that Dygert was arrested January 2, 1862, on a justice's warrant, issued on the complaint of the plaintiff, for procuring an abortion of a quick child, on the plaintiff, at Ilion, Herkimer county, July 5, 1861; that Dygert was bailed by the county judge on the same day, and discharged. The defendant also proved the execution of a paper by him, at the same time the paper firstly introduced by the plaintiff was executed, which was a counterpart and an exact copy, except that it provided that in case any action, either civil or criminal, for the cause aforesaid, should be commenced before July 15,

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1864, either by the people of the State of New York or the plaintiff, then the defendant should repay the \$450 to Dygert. To this paper as evidence, the counsel of the plaintiff objected as incompetent and immaterial. Objection overruled.

The plaintiff offered to show that the money was not paid by Dygert under any agreement to compound, settle or compromise any crime or felony, but in settlement of the plaintiff's claim against Dygert for her private damages for breach of promise of marriage and seduction. The defendant objected to this evidence, and the objection was sustained.

The defendant moved for a nonsuit, on the ground that the agreement was illegal and insufficient; that the money sought to be recovered was placed in the hands of the defendant upon an illegal and corrupt agreement, and that the plaintiff showed no right to recover, except through an agreement and transaction, which embraced an unlawful obstruction of a criminal prosecution.

The court sustained the motion, nonsuited the plaintiff, and ordered the motion for a new trial, upon a case and exceptions, to be heard in the first instance at the general term, and that judgment be stayed until the decision of such motion.

R. Earll, for the plaintiff

I. The equities in this case are strongly in favor of the plaintiff, and she should succeed, unless the strict rules of law require that she should be defeated.

II. It is not a necessary inference from the paper introduced in evidence by the plaintiff that the money therein mentioned was paid to compound a felony. 1. The paper shows that the consideration upon which the money was paid was a cause of action in favor of the plaintiff, which she was required to release before she could get the money. The proof also shows this. 2. The paper contains no

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agreement that any one shall forbear any criminal prosecution, but furnishes evidence that there was no such agreement. 3. At most, it can only be claimed that the money confessedly due the plaintiff should be paid only upon condition that no one did prosecute Dygert criminally for a crime against the person of the plaintiff. In which case, if any part was illegal, it was the condition only, still leaving the money in the hands of the defendant paid to him, upon a good consideration, for the plaintiff. 4. The parties had the right to impose any condition as a prerequisite to the receipt of the money by the plaintiff; and so long as the plaintiff did not agree to anything corrupt or illegal, her ultimate right to the money would not be affected, and she could demand it whenever the condition was fulfilled. 5. The agreement between the plaintiff and Dygert, if any, was not in writing, and there was no evidence that that was corrupt. 6. The rule is well settled that any reasonable construction is to be adopted to prevent a contract from failing by reason of illegality. (*Howden v. Simpson*, 10 Ad. & El. 793. S. C., 37 Eng. Com. L. 249. *Pollack v. Gregory*, 9 Bosw. 116, 133.)

III. There should have been proof that a crime had actually been committed by Dygert. (*The Steuben County Bank v. Matthewson*, 5 Hill, 249.) 1. The condition in the paper had reference to some future prosecution, and not necessarily for the crime for which he had been arrested and which is alleged in the answer. 2. The prosecution mentioned in the paper was for an injury to the person or character of the plaintiff, and not necessarily for the crime which is alleged in the answer, and for which he had before been arrested; which was not an injury to her person, but to the quick child. (3 R. S. 940, 975, 5th ed.) 3. The precise illegality relied upon as a defense must be alleged in the answer, and proved as alleged. (*Dingledein v. The Third Avenue R. R. Co.*, 9 Bosw. 79.)

IV. There is no proof whatever that either the plaintiff

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or the defendant was a party to any corrupt agreement.

1. The plaintiff, so far as the proof shows, signed no instrument and made no agreement. She employed an attorney to prosecute Dygert for a good cause of action, and the money was to be paid to her upon a good consideration. She herself has done nothing to defeat her recovery. 2. There is no proof that the defendant was a party to any illegal or corrupt agreement. The money was deposited with him upon a good consideration passing from the plaintiff, and for her benefit. He agreed to nothing except to hold and invest it, and pay it over upon a certain condition imposed by Dygert, and he agreed to nothing else. It is not even shown that the defendant knew that the alleged crime, or any crime, had been committed, or that Dygert had ever been arrested. 3. There is no legal proof even that the plaintiff had ever charged Dygert with the commission of any crime, or that she had anything whatever to do with the arrest. 4. Even if the condition imposed by Dygert was illegal and corrupt, that might be void and no one be bound to observe it, and yet leave the money in the hands of the defendant for the plaintiff. (*Arkwright v. Cantrell*, 7 *Ad. & El.* 565. *Nicholls v. Stretton*, 10 *Q. B.* 346.)

V. The plaintiff was a minor, and had confessedly a good cause of action against Dygert, and she could not waive it or taint it by any agreement upon her part such as is alleged.

VI. The papers introduced in evidence did not therefore furnish such conclusive evidence that the money was paid upon the illegal and corrupt agreement alleged in the answer, as to preclude the oral evidence offered.

VII. It is only executory agreements, to compound crimes, &c., that are held void. (*Nellis v. Clark*, 4 *Hill*, 424. *Moseley v. Moseley*, 15 *N. Y.* 334. *Daimouth v. Bennett*, 15 *Barb.* 541. *Comyn on Con.* 58, 59.) Such agreements the courts will not aid either party to enforce. But

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when the agreements have been executed, the courts will relieve neither party, but will leave them where they find them.

VIII. Here the corrupt agreement, if any, was fully executed. 1. Everything was done by the plaintiff and by Dygert which was to be done to carry it fully into effect. He had deposited the money for her, and she had forborne to prosecute him. 2. The condition upon which the money was to be fully paid had happened, and by the very terms of the agreement, Dygert had no further claim to, or control of, the money. 3. The agreement having been thus fully executed so far as the plaintiff and Dygert were concerned, the defendant held the money merely as the agent of the plaintiff. 4. The agreement having been thus fully executed, and Bridenbecker having no interest in or claim to the money, what right has he now to hold it, or claim it, or interpose this defense?

IX. But if the defendant should succeed in this defense, what will become of the money? 1. Dygert could not recover it of him; and if the plaintiff cannot recover it, he will hold it without having any claim to it and without having parted without any consideration. 2. Suppose, instead of being deposited with the defendant, it had been deposited in a bank to be checked out by the plaintiff subject to the same conditions, could the bank have refused payment and hold and claim the money against her?

X. In order to recover this money, the plaintiff sues her agent. She does not sue Dygert, nor does she sue upon, or seek to recover through, the alleged corrupt agreement with him. And she does not necessarily sue upon the paper given by the defendant, although she may use that paper as evidence. But she may sue for the money in the hands of the defendant, to which her title is complete. 1. Here the plaintiff requires no aid from the alleged illegal transaction to establish her case, and that is the test whether a demand connected with an illegal transaction is

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capable of being enforced at law. (*Chit. on Cont.* 5th Am. ed. 657. *Gray v. Hook*, 4 Comst. 449. *Rose v. Truax*, 21 Barb. 361. *Buck v. Albee*, 26 Vt. 184. *Pollak v. Gregory*, 9 Bosw. 116, 128.) 2. The case of *Porter v. Havens*, (37 Barb. 343,) which was cited at the circuit for the defense, is not analogous. There the corrupt agreement between the parties was fully proved. The suit was between the parties to that agreement, to reap its fruits. But suppose the money had been placed in the hands of Tracy instead of the notes, as a mere depository, and, after the corrupt agreement had been fully carried into effect by all the parties to it, he had refused to pay over the money, could he have retained the money?

XI. The instrument and warrant introduced in evidence, considered in connection with the evidence of Wendell and the circumstances surrounding the transaction, did not furnish a case so clearly against the plaintiff as to leave no question for the jury. Hence the court erred in nonsuiting the plaintiff and refusing to leave the facts to the jury.

C. A. Moon, for the defendant.

I. The counterpart, or paper proved by the witness Richardson, was properly received. It was a part of the arrangement, and served to characterize the transaction.

II. The oral evidence, offered, to show that the money was not paid to compound, settle or compromise any crime, but that the same was paid in settlement of the plaintiff's claim for private damages for breach of promise of marriage, was properly excluded. 1. It was an offer substantially, to contradict the written agreement already introduced in evidence by the plaintiff. (a.) One of the stipulations of that agreement was, that the plaintiff should not in any manner or form, institute any civil or criminal prosecution against Dygert, either in her own behalf, or in behalf of the people of the State of New York. (b.) It was proposed to show that a claim for breach of promise

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of marriage and seduction was settled, while the written agreement refers to an injury to the person or character of the plaintiff. 2. The written agreement implied that the plaintiff should abstain from or drop criminal prosecutions. This being the plain meaning of the contract upon its face, it was not open to explanation by parol. (*Porter v. Havens*, 37 Barb. 343.)

III. The motion for a nonsuit was properly granted. The agreement upon which the action is brought is illegal. It was made to suppress a criminal prosecution or compound a felony. 1. Dygert was recognized to appear at the next court, which sat February 3, 1862; the agreement was made February 1, 1862. The defendant was to pay the \$450 to the plaintiff, if no civil or criminal prosecution was instituted, and repay the same to Dygert, if any civil or criminal action was commenced before July 15, 1864, which was five days after the crime could be prosecuted by the statutes of limitation. Such a contract is clearly illegal. (*Porter v. Havens*, *supra*.) 2. It is made an offense, by statute, to compound a felony, or to abstain from any prosecution therefor. (3 R. S. 969, 5th ed.) 3. An agreement to put an end to a prosecution for a misdemeanor, without leave of the court, is illegal. (2 Archbold's Cr. Pr. and Pl. 1066, 7th ed.; citing *Jones v. Rice*, 18 Pick. 440; Barb. Crim. Law, 216.) 4. "The offense of compounding a crime, created by statute, is undoubtedly confined to the party receiving the money or property, and does not extend to the party paying it." (*Daimouth v. Bennett*, 15 Barb. 542.) "The bargain and acceptance constitutes the crime." (2 Arch. Cr. Pr. and Pl. 1065.) 5. The plaintiff was, therefore, the only person guilty of a violation of the statute. She, being the guilty party, cannot enforce this contract. (*Rose v. Truax*, 21 Barb. 361. *Moseley v. Moseley*, 15 N. Y. 334-336. *Nellis v. Clark*, 4 Hill, 424. 2 Phil. Ev. 684, Edw. ed., and cases there cited.)

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IV. It is clear, from the authorities, that this contract could not be enforced against Dygert. Neither can it be enforced against the defendant. 1. It was an illegal trust. "But no valid trust can be founded on an interest derived from an illegal contract, or established in contravention of the general policy of the law." (*Hill on Trustees*, 70. *Id.* 245.) 2. "Neither a prior debt, or any other good consideration, will support a new contract which is, in itself, contrary to the provisions of the law." (*Leavitt v. Palmer*, 3 *N. Y.* 19, 36, 37. *Chitty on Cont.* 683, *mar. pag.* 586, 9th *Am. ed.*, and *cases there cited*, n. 1.) 3. Even if the plaintiff had a cause of action against Dygert for damages, yet, as this was all one transaction between the plaintiff, Dygert and the defendant, part of the consideration on the face of the contract being illegal, the whole agreement is void. The contract was entire. (*Hill on Trustees*, 70, n. 2, and *cases cited*. *Gray v. Hook*, 4 *N. Y.* 449, 459. *Decker v. Morton*, 5 *N. Y. Sur. R.* 477. *Burt v. Place*, 6 *Cowen*, 431. *Rose v. Truax*, *supra*. *Bell v. Leggett*, 7 *N. Y.* 176. *Barton v. The Port Jackson Plank Road Co.*, 17 *Barb.* 397. *Comyn on Cont.* 25.) 4. Any contract or security, into the consideration of which the compounding of a felony or the dropping of any criminal prosecution in any part enters, is void. (2 *Arch. Cr. Pr.* 1066. *Barb. Crim. Law*, 216. 1 *Story's Eq. Jur.* 295, 7th *ed.*, and *cases before cited*.)

MORGAN, J. The plaintiff's complaint charges that prior to February, 1862, she had a just and valid claim against Daniel F. Dygert for damages, which he settled at \$500; that he was to pay \$50 down, and the residue to be placed in the hands of the defendant for her use and benefit. That Dygert paid her the \$50, and paid to, and placed in the hands of the defendant, \$450, for her use and benefit, which sum the defendant agreed to keep and hold as her trustee, and to invest the same for her, and

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pay over to her annually the interest and income, and to pay her the principal sum on the 15th day of July, 1864; which he neglected and refused to do, although specially requested.

The answer of the defendant alleges that prior to February, 1862, Dygert was arrested and held to bail for the commission of a felony, viz., in aiding the procuring of an abortion of a quick child upon the person of the plaintiff; and that Dygert paid the plaintiff \$50, and put \$450 in the defendant's hands to be paid to her, in consideration, among other things, that the criminal prosecution then commenced should be abandoned.

On the trial, the plaintiff produced in evidence an agreement in writing, bearing date February 1, 1862, signed by the defendant, by which he acknowledged the receipt of \$450 from Dygert to be held by him upon certain trusts therein mentioned, or until the same was revoked. This agreement promised that on the 15th day of July, 1864, the said sum of money should be paid to the said plaintiff as her own, *provided that before that time no prosecution should in any manner and form be instituted against the said Daniel F. Dygert*, on account of any alleged injury to the person or character of the plaintiff, either civil or *criminal*, or in her own behalf, or *in behalf of the people* of the State of New York. And also provided that the plaintiff should also execute a release of all demands.

The plaintiff also proved that she executed a release, and thereupon demanded the money of the defendant, July 15, 1864. The defendant then proved that Dygert was arrested January 2, 1862, and held to bail upon a criminal warrant charging him with the criminal offense of assisting in procuring an abortion of a quick child upon the person of the plaintiff, at Ilion, July 5, 1861. The defendant then proved, by Thomas Richardson, the execution of another agreement by the defendant to Dygert, upon the same subject, written at the same time, which contained

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a further provision that if any action, either civil or criminal, for the causes aforesaid, should be commenced on or before the 15th of July, 1864, either by the people or the plaintiff, then and in that case the defendant engaged to repay the money to Dygert. The plaintiff objected to the reception of this agreement in evidence, but the objection was overruled, and the plaintiff excepted.

The plaintiff produced as a witness Jacob Wendell, who was present at the execution of the two agreements, and offered to prove by him that the money mentioned in the agreement was not in fact paid to compound a felony, but that the sum was paid in settlement of the plaintiff's claim against the said Dygert, for her private damages, for breach of promise of marriage and seduction. This offer was overruled by the court, to which the plaintiff excepted.

The defendant's counsel then moved for a nonsuit, upon the ground that the agreement upon which the action was brought was illegal and void, as against public policy. Which motion was granted by the judge, and the plaintiff's counsel excepted to the decision.

It seems to me that the case is too plain for argument; and that nothing can be necessary to be said to show that one indispensable condition upon which the money is to be paid to the plaintiff, was the successful suppression of criminal proceedings which had already been instituted against Dygert. By the 15th day of July, 1864, it would be too late to indict him, for the three years' limitation would have expired, the alleged offense having been committed at Ilion on the 5th day of July, 1861. This was certainly a contract which tended to obstruct and interfere with the administration of public justice, and of the laws, and it is unnecessary to cite authorities to prove that it is utterly void. No valid trust can be founded upon an interest derived from an illegal contract, or established in contravention of the general policy of the law. (*Hill on Trustees*, 45.) The claim that the contract had been ex-

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ecuted cannot be supported. This suit is brought to enforce it, and for that reason the court cannot aid the plaintiff, although it would not by any means assist the defendant, if its aid should become necessary to enable him either to execute or to defeat the trust.

It is also quite apparent that the plaintiff could not be permitted to prove, in opposition to the express stipulation of the agreement, that it was not a part of the understanding that criminal proceedings should be abandoned.

In my opinion, it is too plain to require farther examination. (*Porter v. Havens*, 37 Barb. 343.) There was nothing in the second agreement proved that changed the character of the transaction, and the objection to the reception of that in evidence was a matter of no consequence whatever. Indeed the action cannot be sustained upon any view of it, unless we are prepared to shut our eyes to the clearest evidence of a corrupt agreement to suppress a criminal prosecution.

The motion for a new trial should be denied.

BACON, J., concurred.

MULLIN, J., (dissenting.) I regret that I am compelled, by force of authority, to vote for reversal of this judgment. If a way can be found by which persons guilty of felony can compound it and the prosecutor receive the price of the illegal bargain without violating the rules of law, I very much fear that crime will be committed with an impunity which it has not heretofore been understood to enjoy, and with an audacity never before exhibited. Declaring an agreement to compound a felony illegal and void between the parties to it and yet giving it effect, when an agent, stakeholder or other trustee is interposed between them, is practically to surrender the principle, to make lawful that which the public safety and the public morals require should be rendered utterly impossible of

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accomplishment. What criminal, with the state's prison or the gallows staring him in the face, will refuse to deposit with an agent of the prosecutor whatever sum the latter may demand, and he be able to pay, to secure the silence of the only person who can bring him to justice? It is true both parties are indictable for entering into such an agreement, yet how very slight is the danger of a conviction where the only persons cognizant of the crime are the accused themselves, and who, if they are shrewd, have carefully obliterated all traces of the unlawful combination, thus enabling themselves to enjoy in safety the fruits of their criminal arrangement.

But the question for us to determine is whether, by the laws of the land, the plaintiff is entitled to recover, and not what the effect of such a recovery may be upon the public or individuals. Where it is doubtful what the law is, upon a given state of facts, it is not only proper but it is the duty of a court to inquire what the effect will be upon the interests of the public, or of individuals, in determining the rules of law which should be applied in the case; but when it is found that the rules are already settled authoritatively, it is the judge's duty to declare the law to be as he thus finds, without regard to consequences, leaving it with the legislature to change the rule, or to some appellate tribunal to reverse the judgment and declare the law as in its judgment it is found to be.

A person standing in the relation to the plaintiff and Dygert which the defendant did, is not, strictly speaking, either an agent or stakeholder, and yet his relation partakes of both, but mostly that of an agent. He is at all events a trustee for both parties until the happening of the contingency when the plaintiff becomes entitled to the money, at which time he becomes the agent of the plaintiff. The defendant, when the day arrived on which the plaintiff became entitled to the money, held it exclusively for her benefit, unless Dygert might even then, upon

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notice, have recalled it, and if not paid over have maintained an action for it. Whether such an action would lie it is not material to inquire. It is enough to know that Dygert never has demanded it or forbidden the defendant to pay it over. Were it not for the consequences which are likely to follow the establishment of the right to compound a felony, we could not hesitate to declare the law to be that an agent or trustee to whom money is paid for the use of his principal cannot, in an action brought by the principal, defend himself by showing that the consideration of the agreement under which it was paid to him, was illegal. In *Tenant v. Elliott*, (1 Bos. & Pul. 3,) the defendant, a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies on an imperial ship. The ship was lost, and the underwriters paid the amount of the insurance to the defendant, who refused to pay it to the plaintiff, although the underwriters had not interfered. By a statute of the parliament such an insurance was utterly void. The action was for this money, and the plaintiff had a verdict. The defendant applied for an order to show cause why the verdict should not be set aside. A rule was refused. Buller, J., said: "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose shall he retain it? To whom is he to pay it? Who is entitled to it but the plaintiff?" Eyre, Ch. J., said: "The defendant is not like a stakeholder. The question is, whether he who has thus received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him. I think he cannot." In *Farmer v. Russell*, (1 Bos. & Pul. 296,) the action was against the defendants as carriers. The plaintiff delivered to the de-

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defendants a quantity of counterfeit half pence to be carried to Portsmouth and delivered to a person there, under the name of medals, for a commission to be paid. The defendants were not to deliver the medals until they were paid for them. The medals were carried and delivered and payment received, and the money accounted for, except £13, for which the action was brought. There was some doubt whether the defendants knew the property to be counterfeit coin. There was a verdict for the defendants, with leave to move to set it aside. The doctrine of *Tenant v. Elliott* was held to apply, and a new trial was ordered. It seemed to be the opinion of some of the judges that if the defendants had been cognizant of the character of the coin, a different conclusion might have been arrived at. Rook, J., was of opinion that if the plaintiff, in order to recover, proved the illegality of the consideration, he could not maintain the action. But none of the judges concurred with him in this view. Eyre, Ch. J., said "that if it was possible to mix up the original transaction (that is, the one between the defendants and the person at Portsmouth) with the contract on which the action was brought," then he concurred in the conclusions of Rook, J. The other judges held there was no connection between the two transactions, so as to render invalid the contract on which the action was brought, and hence the case of *Tenant v. Elliott* applied. (*Hastelow v. Jackson*, 8 B. & C., 221.) In *Griffith v. Young*, (12 East, 513,) the action was brought to recover £40, which the defendant agreed to pay the plaintiff, his landlady, being part of a bonus of £100 which one Pugh agreed to pay the defendant for the good will of the leased premises, which could not be transferred to Pugh without the plaintiff's consent, and it was in consideration of her consent that the £40 was to be paid. Pugh, cognizant of this agreement, paid the £100 to the defendant, who afterwards promised to pay it, and told her to send for it. The

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plaintiff was nonsuited, on the ground that the agreement was void, not being in writing. *On motion*, the court set aside the nonsuit. Lord Ellenborough, Ch. J., delivering the opinion of the court, says: "If one agree to receive money for the use of another upon a consideration executed, however frivolous or void the consideration might have been in respect to the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other." This case was decided in 1810. That of *Tenant v. Elliott*, in 1797. But while Lord Ellenborough's qualification of the general rule as to the liability of one receiving money for the use of another, that such money cannot be had when the consideration on which it was paid was immoral or illegal, is wholly at variance with the doctrine of *Tenant v. Elliott*. Yet I do not find that the latter case has ever been deemed to be overturned or even shaken by the suggestion in *Griffith v. Young*. In *Paley on Agency* (p. 62) the principle under consideration is thus clearly and fairly stated: "It is then said that if money have been actually paid to an agent for the use of his principal, the legality of the transaction of which it is the fruit does not affect the right of the principal to recover it out of the agent's hands." (*Chitty on Cont.* 620.)

If the agreement of the agent is supported by the same consideration as that upon which the payment to the agent was made, the contract of the agent would be void, as is that between the principal and the person paying. (*Armstrong v. Toler*, 11 *Wheat.* 258.) In the case cited, the goods having been unlawfully imported into the United States by Armstrong and others, were seized, and after seizure Toler agreed to pay the duties demanded by the government, and Armstrong agreed to pay Toler his proportion of the money thus paid. Upon payment by Toler, the goods were released and delivered to Armstrong and

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others, and thereupon Toler sued the defendant Armstrong for his proportion of the money thus paid, pursuant to the agreement. The plaintiff recovered, and the defendant brought a writ of error. On the trial, the court charged the jury that when the contract grows immediately out of an illegal act, a court of justice will not enforce it. But if the promise be unconnected with the illegal act, it is founded on a new consideration; it is not tainted by the act, although it is known to the party to whom the promise was made, and although he was the author and conductor of the illegal act. The proposition was thus illustrated: A., during a war, contrives a plan for importing goods on his own account from the country of the enemy, and goods are sent to B. by the same vessel. A., at the request of B., becomes surety for the payment of the duties, and is compelled to pay them, and the question is can he maintain an action on the promise of B. to return this money. Marshall, Ch. J., in examining, in a very able and elaborate opinion, the question thus presented, says: "The case does not suppose A. to be concerned, or in any manner instrumental, in promoting the illegal importation of B., but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself which B. afterwards adopted. * * * The contract made with the government for the payment of duties is a substantive independent contract, entirely distinct from the unlawful importation. The consideration is not affected with the vice of the importation. * * If A. should become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B. to enable him to pay those expenses," the court thought this "would constitute a new contract, the consideration of which should be sufficient to maintain an action." After remarking that the defense of a suit brought in consequence of an illegal consideration was lawful, the learned judge proceeds to say: "Money ad-

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vanced by a friend in such a case is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration. * * A subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler when the contract was made, provided he was not interested in the goods, and had no previous concern in the importation."

I have cited somewhat extensively from this case, as it illustrates how the parties to the new or collateral contract must have been connected with the original unlawful one, in order to render such collateral contract void. The same learned judge proceeds to review the English cases which I have cited, and others bearing on the question, and adopts the conclusions arrived at in those cases; so that we have the concurrence of this eminent jurist in the proposition which those cases assert, that when money comes into the hands of a person through or by means of an illegal contract or transaction for the benefit of one of the parties to such illegal proceeding, he cannot defend an action by alleging the illegality of the consideration by means of which it came into his hands.

In the case before us the defendant was not in any manner connected with the illegality of the consideration upon which he received the money. But it is obvious that he was the instrument selected to carry into effect the unlawful arrangement. I was at first disposed to think that this took the case out of the principle of the cases cited, and made it one in which the defendant was really engaged in the unlawful arrangement, and was therefore like the case put by the judge at the trial of *Armstrong v. Toler*, of the party sued being consignee of goods consigned with his privity that he might protect and defend them for the owners. In which case the judge held that a bond or promise given to pay advances made in pursu-

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ance of such understanding or agreement would be utterly void.

In *Farrier v. Russell* (*supra*) the defendants were the carriers of the counterfeit coin, and the money was paid to them for such coin. They were the very instruments by which the crime was committed, and yet they were held liable for the money so received. Rook and Eyre, JJ., were of opinion that if it appeared that the defendant knew of the character of the property he carried, he would be thereby a party to the illegal transaction. But Buller and Heath, JJ., were of the opinion that knowledge of the nature of the property was not material. *Tenant v. Elliott* is a case in which the defendant (being the broker who effected the illegal insurance) knew all about it, and yet that knowledge did not relieve him. *Camden v. Anderson* (1 B. & P. 277) was in its facts precisely like *Tenant v. Elliott*.

In *Aleinbrook v. Hall* (2 Wils. 309) the action was for money lent to pay a bet at a horse race. The plaintiff knew the purpose, as Arnold swore, for which it was borrowed. *Faikney v. Reynous* (*Burr.* 2069) was for money loaned, to be used, with the knowledge of the plaintiff, in an illegal transaction.

Upon a careful review of all the authorities, I am constrained to hold that the plaintiff is entitled to recover, and that the defendant cannot avail himself of the illegality of the dealings between the parties to the arrangement by means of which the money came into his hands, as a defense.

I am therefore in favor of setting aside the nonsuit, and granting a new trial, with costs to abide the event.

New trial denied.

[ONONDAGA GENERAL TERM, October 8, 1865. *Mullin, Morgan and Bacon*, Justices.]

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Although another State cannot create a corporation within this State, yet it is no objection to the corporate acts of a foreign corporation done in this State that they are authorized by a meeting of the directors, held in this State, when the acts so authorized are not repugnant to the policy of our own laws.

Where the defense of usury is unavailable to a corporation, it is also unavailable to one who has guarantied the payment of its bonds. MULLIN, J., dissented.

Corporations being prohibited, by statute, from interposing the defense of usury, in any action, one who has guarantied the payment of bonds issued, in this State, by a foreign corporation, for the payment of loans, in pursuance of a resolution of the directors, at a meeting held in this State, which bonds bear an interest of ten per cent, and are valid by the laws of the State where the corporation is located, cannot set up the defense of usury, when sued upon a bond, as guarantor.

APPEAL, by the defendant, from a judgment entered upon the report of a referee. The report was in favor of the plaintiff for \$168.78. Judgment January 31, 1865, for \$240.57, damages and costs.

The complaint alleges, in substance, that by the laws of the State of Illinois the Rock Island Coal and Coke Company was authorized to borrow money upon the bonds of the company, to an amount not exceeding \$100,000, and to pay interest thereon at the rate of ten per cent. That on the 15th day of March, 1859, the company issued six of its bonds, for \$200 each, payable to Edward B. Judson, or bearer, at the Merchants' Bank in Syracuse, with interest at the rate of ten per cent per annum, payable at said bank semi-annually, on the first days of April and October, on presentation of the interest warrants and coupons attached to said bonds. That said bonds were delivered to one Coddington B. Williams, for value received, and that Thomas G. Alvord, the defendant, at the time of the issuing and delivery of the bonds in question, for value received, guarantied the payment of the same,

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with the interest thereon, according to their tenor and effect.

The plaintiff having purchased these bonds, and the interest not being paid on presentation of the coupons at the Merchants' Bank in Syracuse, brought this action to recover the back interest, amounting to \$150.

The answer of the defendant, after denying the allegations of the complaint generally, states that the Rock Island Coal and Coke Company was located at Syracuse, where its officers resided and did their business, where it issued its bonds, although incorporated by the legislature of the State of Illinois; and that said bonds are void for usury.

The referee found, as matter of fact, that the Rock Island Coal and Coke Company was incorporated by the Illinois legislature, in 1857, for the purpose of mining, loading, transporting and selling mineral coal and other products taken from lands in Illinois, and was empowered to take and hold certain lands for that purpose, and to hold meetings within or without the State of Illinois. That on the 11th day of March, 1859, the board of directors held a meeting at Syracuse, N. Y., and passed a resolution authorizing the issuing of the bonds in question. That the board of directors consisted of five persons, three of whom resided in Syracuse, and that Edward B. Judson, the trustee to whom said bonds were made payable, resided there also. That said bonds were secured by a mortgage on the real estate of the company in Illinois, payable to said Judson as trustee. That Coddington B. Williams, above named, was one of the directors, and that said bonds were negotiated and delivered to him. That at a prior meeting of the stockholders, in Syracuse, the defendant was present and assented to the issuing of bonds, and stated that he would guaranty \$3000 of said bonds, the same being his pro rata share; and that C. B. Williams agreed to take the bonds, and afterwards applied

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to the defendant for his guaranty; and that the defendant gave it, as he had agreed to do.

It was further found by the referee, that the corporation borrowed of C. B. Williams \$3000, when the bonds in question were issued, and that said bonds, to that amount, were delivered to him to secure the payment of said sum, at ten per cent; and that the defendant agreed, at the time, to guaranty the payment of said loan, with interest at that rate. And that all these things were done under and with reference to the laws of the State of Illinois. To which finding the defendant excepted.

The referee found, as a conclusion of law, that inasmuch as the corporation could not set up the plea of usury by the laws of this State, the defendant, as guarantor, could not set it up.

He also found that the contract was to be governed by the laws of the State of Illinois, having taken place with reference to those laws. There were exceptions to these conclusions of law, and the question was upon these exceptions.

Charles Andrews, for the appellant.

I. The guarantor of a usurious contract can interpose the defense of usury. (2 *Parsons on Cont.* 368. *Hungerford's Bank v. Dodge*, 30 *Barb.* 626. *Parshall v. Lamoreaux*, 37 *id.* 189.)

II. The defendant is not prevented from interposing the defense in this action, although the corporation which issued the bonds could not interpose it. The act of April 6, 1850, declaring that "no corporation shall thereafter interpose the defense of usury in an action," deprives the corporation of this defense, but leaves the other parties to a contract of a corporation free to interpose it. (*Hungerford's Bank v. Dodge*, 30 *Barb.* 626. *Curtis v. Leavitt*, 15 *N. Y.* 10.)

III. The bonds in question were executed and nego-
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tiated within this State, and were, by their terms, payable here. They were New York contracts, and their validity is to be determined by the laws of this State. 1st. The validity of a personal contract is to be determined by the law of the place where it was made, unless it is, by its terms, to be performed at a different place, in which case the law of the place of performance determines it. (*Thompson v. Ketcham*, 8 John. 190. *Jewell v. Wright*, 27 How. 481. *Story on Conflict of Laws*, § 291.) The rule in some of the States allows interest to be stipulated according to the law of either State, when the contract is made in one State but is to be performed in another. (*Depeau v. Humphreys*, 20 Mart. 1. *Pars. on Cont.* 96.) If, however, a contract is expressly payable, or to be otherwise performed there where it is made, then it is the only place by which its validity is to be determined. (*Pars. on Cont.* 95.) 2d. In determining the validity of a contract in respect to usury, it is not a material circumstance that its performance is secured by a mortgage or other security, upon property situated in another country, where a different rate of interest prevails. (*Story on Conflict of Laws*, I. 293. *De Wolf v. Johnson*, 10 Wheat. 367.) The case of *Chapman v. Robertson*, (6 Paige, 627,) does not conflict with this doctrine, and that case has been questioned and substantially overruled. (*Curtis v. Leavitt*, 15 N. Y. 88. *Story on Conflict of Laws*, I. 293, note.)

IV. The bonds (as to this defendant) were usurious, and the guaranty was void. 1st. They were issued upon a loan of money by Williams to the corporation. 2d. They were executed in this State, and were negotiated there to a citizen of this State. 3d. By their terms, the bonds and coupons were payable here. 4th. The defendant was an accommodation guarantor for the corporation. 5th. The plaintiff took the bonds with notice (upon their face) of their invalidity.

V. The point upon which the referee decided the case,

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to wit, that the bonds were made with reference to the law of Illinois, and were not, therefore, usurious, is unfounded in fact and in law. 1st. The terms of the contract are decisive, that the contract was made with reference to the law of New York. Kent, J., in *Thompson v. Ketcham*, (8 John. 192,) says: "The force and effect of a contract must be determined from the contract itself, and not by proof, *aliunde*. The *lex loci* is to govern, unless the parties had in view a different place, by the terms of the contract." 2d. The parties may have supposed that the bond would be valid by force of the statute of Illinois; but this mistake of law did not make them Illinois contracts.

James Noxon, for the respondent.

I. The law of usury is not applicable to contracts made by corporations; as to corporations there is no usury law, and their contracts are valid. (*Laws of 1850*, p. 334.) 2. The effect of the statute is wholly to repeal the usury laws as to corporations, and to render their contracts legal and valid, irrespective of the interest they agree to pay. (*Curtis v. Leavitt*, 15 N. Y. 85, 151, 174, 229, 255. *Butterworth v. O'Brien*, 23 id. 275. S. C., 28 Barb. 187.) 3. The statute applies to foreign corporations. (*Southern Life Ins. Co. v. Packer*, 17 N. Y. 51.) 4. The principal contract being free from usury, and in all respects lawful, the undertaking of the guarantor is necessarily valid also. 5. In this case the guarantor was a stockholder, and a party to the issuing of the bonds, and comes clearly within the prohibition of the statute against setting up usury. 6. The case of *Hungerford Bank v. Dodge*, (30 Barb. 626,) overruling the decision of Justice Mason at special term, (19 How. 40,) it will be claimed, disposes of this question, in this district. We insist that the reasoning of the court in the cases cited, reported in 15 New York and 23 id., is at variance with the decision in 30 Barbour, and that the

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opinion of Justice Mason is sustained by the authorities cited, and should be regarded as the law of the land.

II. The bonds in question are to be regarded as made in Illinois, under a law of that State, and with reference to the law, and issued under and in pursuance of its provisions. Whenever or wherever the company acts, it does so under its charter. It can make no difference where the directors meet and transact the business of the company; it is the act of the corporation, whether it speaks through its directors in or out of the State. The charter so expressly allowed it to speak, and the law of Illinois governs, in the same manner as if the meeting had taken place in that State. The business of the corporation was there; its coal lands and property, its objects and operations were carried on in that State, and its acts are to be governed by the laws of that State. In *Fanning v. Consequa*, (17 John. 511,) the rule is laid down, that interest is payable according to the laws of the country where the contract is made; but if, by the terms of the contract, it appears it is to be executed in another country, or that the parties had reference to the laws of another country, then the place in which it is made is, in this respect, immaterial, and it is to be governed by the laws of the country in which it is to be performed. In *Thompson v. Ketcham*, (8 John. 193,) Kent, Ch. J., says: "The *lex loci* is to govern when the parties had in view a different place, by the terms of the contract. Lord Mansfield, in *Robinson v. Bland*, (2 Burrow, 1078,) says the law of the place can never be the rule where the transaction is entered into with an express view to the law of another country." In *Le Breton v. Miles*, (8 Paige, 261,) two natives of France entered into an ante-nuptial contract in New York, relative to their future interests in the property which they had at the time of marriage, and in reference to the laws of France. It was held that the rights of the parties under the contract, must be governed by the law of France. In

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St John v. The Am. Mu. Life Ins. Co., (2 Duer, 419,) it was held that the construction and effect of an insurance policy made by a corporation of another State, although the contract was made in this State, was to be governed by the law of the foreign State. See also same case on appeal to the Court of Appeals, 3 Kern. 31. In *Pomeroy v. Ainsworth*, (22 Barb. 128,) the rule is laid down, that the law of the place where the contract is made governs, unless it is made with reference to the laws of another State. To the same effect, see *Sherrill v. Hopkins*, (1 Cowen, 108;) *Chapman v. Robertson*, (6 Paige, 630.) In *Cutler v. Wright*, (22 N. Y. 474,) it was held that a note made and executed in this State, but dated and made payable in Florida, was to be regarded as a Florida contract, and the court say, "In *Curtis v. Leavitt*, (15 N. Y. 85,) it is said the authorities do not leave this question in doubt." Regarding the bonds as issued under and in reference to the laws of Illinois, they are legal and valid, and the guaranty of such bonds will not be tainted with usury.

III. If the bonds are regarded as made in Illinois, the question arises, what law governs, as to interest. The bonds are payable in another State. Hence the place of making and the place of performance are in different States. The general rule, in the construction of contracts, is that the place of performance governs. To this rule there are exceptions, and the law is now settled in this State as to interest, that the parties may, by their contract, stipulate or agree upon the rate of interest as it exists in the place where the contract is made, or where it is to be performed, and the law will enforce the interest agreed upon. As to interest, we claim the rule to be that, if a contract is made in one State to be performed in another, and the interest is not specified, the law of the place of performance or payment governs. This is the doctrine of the case of *Jewell v. Wright*. It decides just so much, and no more. The counsel for the appellant in

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that case, reviewed all the authorities, and at the close of his points says: "The law is so well settled that it is unnecessary to cite authorities, that when a contract is made in one State to be performed in another, the parties may stipulate the highest rate of interest in either." The precise question was decided in the case of *Depeau v. Humphreys*, (20 *Martin*, 1,) and Justice Story, in his *Conflict of Laws*, discusses the same question, and disapproves of the decision. *Parsons*, in his *Law of Contracts*, (2 vol. p. 96,) reviews the opinion of Judge Story, and reaches a different conclusion, from the same authorities. The authority in 1 *Martin* was approved in *Chapman v. Robertson*, (6 *Paige*, 627;) *Peck v. Mayo*, (14 *Verm.* 33;) *Hosford v. Nichols*, (1 *Paige*, 220;) *Pratt v. Adams*, (7 *id.* 616;) *Curtis v. Leavitt*, (15 *N. Y.* 227;) *Balme v. Wombough*, (38 *Barb.* 363.) In 2 *Parsons*, 95, the rule is laid down, that if a note is made in one place expressly bearing an interest legal there, and payable in another place in which so high a rate of interest is not allowed, it may be sued where payable, and the interest expressed, recovered. At page 391, *Parsons* says, if a foreign contract provides for interest which is lawful where the contract is made, it will not be declared void for usury in a State in which only a lower interest is allowed by law. In 2 *Kent*, 460, (10 *ed.* 622,) the same rule is laid down, and at the close of the note, on page 623, it is said, the principle now established in Louisiana and New York is, that the place where the contract is made determines its validity as to interest, though made payable in another State, where the rate of interest is lower.

IV. The defendant is sued as a guarantor of the bonds of the coal company, and cannot interpose the defense of usury. (*Mann v. Eckford*, 15 *Wend.* 502. *Draper v. Trescott*, 29 *Barb.* 408. *Vilas &c. v. Jones*, 1 *N. Y.* 274.)

V. The defendant, in this case, stands in the same situation as though he had taken the bonds, and under the

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evidence he should be regarded as a lender. The act of becoming guarantor was only another method adopted by him to place so much money in the hands of the company, because he then had not the means to advance upon the bonds allotted to him

MORGAN, J. I had doubts, at first, whether the corporation could exercise its functions within the limits of this State. In *Merrick v. Brainard and others*, decided by this court in January, 1860, (38 Barb. 574,) it was held that a corporation created by the laws of Connecticut could not make a valid contract in this State, when it appeared, from the evidence, that, except in the formal election of its officers, its principal business was transacted in this State. (*Reversed on appeal*, 34 N. Y. 208.) I did not concur in that decision; nor do I think it necessarily controls the case at bar; for the evidence here shows that the business of the Rock Island Coal and Coke Company is transacted in Illinois, except that the meetings of its directors are sometimes held in this State. It is undoubtedly true that the State of Illinois cannot create a corporation within this State, but it is no objection to the corporate acts of a foreign corporation in this State, that they are authorized by a meeting of directors held in this State, when the acts authorized by the directors are not repugnant to the policy of our own laws. (*Angell & Ames on Corp.* 250, *et seq.* *McCall v. Byram Manuf. Co.*, 6 Conn. 428.)

Assuming that the Rock Island Coal and Coke Company duly authorized the issuing of the bonds in question, by a resolution of the directors at a meeting held at the city of Syracuse in this State, and that they are valid by the laws of Illinois, where the company is located, the first question is, whether the defendant, who guarantied their payment, is in a position to defend upon the ground of usury.

It is claimed that this question has already been dis-

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posed of, so far as this court is concerned, against the views of the plaintiff.

By the laws of this State, (*Sess. Laws of 1850, p. 334*,) a corporation cannot plead usury to avoid its contracts; and this applies to *foreign* as well as domestic corporations. (*Southern Life Ins. Co. v. Packer*, 17 N. Y. 51.) It was decided in this court, in the case of *The Hungerford Bank v. Dodge*, (30 Barb. 626,) that indorsers of a promissory note made by a corporation were not within the act, and might interpose the defense of usury, though the principal could not. That decision was made by a divided court, but the case was well considered by the learned justice who delivered the prevailing opinion, and is entitled to our respect as authority, until it is overruled by a higher tribunal. The reasoning in the cases of *Curtis v. Leavitt*, (15 N. Y. 9,) and *Butterworth v. O'Brien*, (23 id. 275,) seems to conflict somewhat with the authority of *Hungerford Bank v. Dodge*; but the case itself has twice been decided in this court, and I am inclined to follow it, unless the judge who concurred in the decision is of opinion that the principles upon which it was decided are overruled by the Court of Appeals. It may be difficult to reconcile it with the reasoning of the judges in the cases above referred to in the Court of Appeals; but it is apparent, I think, that a statute which estops a corporation from pleading usury, is not necessarily to be construed so as to include those who indorse its paper or guaranty the payment of its loans. It is a question of construction, and this court having adopted a certain rule in reference to the statute of 1850, I am not inclined to depart from it, until a higher court shall have decided the other way, or the judge who concurred in it, shall express a desire to reconsider the question.

The next and principal question is whether the contract is usurious. Let us state the case briefly before citing the authorities. The Rock Island Coal and Coke Company is an artificial being, having its residence in the State

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of Illinois. It is authorized by the legislature of that State to borrow money at ten per cent. It came to Syracuse, N. Y., and made its obligations, agreeing to pay ten per cent for money. The contract or loan was made in Syracuse. The money was borrowed, and the repayment of the loan and interest was to be made in Syracuse. This does not differ from the case of an individual authorized by the laws of the State of Illinois to borrow money at ten per cent, to be used in some enterprise in the latter State. He may borrow the money in this State, or he may negotiate his obligations in England or Holland. If the payment is to be enforced in the State where the person resides, and when the loan is authorized, there can be no difficulty in the case. The difficulty grows out of the fact that the contract is made in a State where the loan of money at a greater rate of interest than seven per cent is prohibited, and where the contract of the guarantor is to be enforced. The laws of Illinois have no binding force in this State, and this court does not sit to administer these laws, but our own.

It is said that the contract was made in Illinois. This position is not sound. The corporation, so to speak, came into this State and made the contract here, and agreed to repay the borrowed money here.

It is therefore as much a New York contract as though an individual of another State came here and borrowed money of one of our citizens, agreeing to repay the same at some of our banking institutions in this State. It is said that all contracts which are to be construed within the State in which they are made, must be construed according to the laws of that State. (2 *Pars.* 82.) And the same thing is true in general, when contracts are construed in a place other than that in which they are made. (*Id.*) This is the general rule; but there are exceptions. It is also said that foreign laws may have a qualified force within a State, by the comity of nations, or by constitu-

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tional provisions. In the absence of legislative interference, it may, perhaps, be said with truth that laws of another State may have some operation in this State, when they do not conflict with the operation of our own laws.

As to the validity of contracts, the general rule is that a contract which is valid where it is made, is to be held valid anywhere. And on the other hand, if void or illegal by the laws of the place where made, it is void everywhere. (2 *Pars.* 82, and note, and authorities there cited.) It is, however, claimed that although contracts are generally to be construed according to the laws of the place where they are made, still there is an exception to this rule when the contract is made in reference to a foreign law. There is no principle upon which such an exception can be supported. It would, in effect, give to a foreign law a power to control and supercede our own laws, upon the same subject matter. This principle cannot be admitted.

If the bonds in question had been made payable in Illinois, there are authorities which hold that the laws of Illinois might be applied to them. But these bonds, being made expressly payable in this State, where they were executed, the laws of this State must, upon all the authorities, be applied to them. (2 *Pars.* 95.)

The appellant's counsel cites the case of *Le Breton v. Miles* (8 *Paige*, 261) as an authority for a different rule. That was the case of an ante-nuptial contract entered into in this State by two natives of France, relative to their future interests in property which they had at the time of the marriage, or which they should acquire during coverture. It was made in reference to the laws of France, where the parties expected to reside. The chancellor held, that as France was their intended domicil, the laws of France must be resorted to, to determine their rights to personal property, as affected by the ante-nuptial contract. No

authorities are cited to sustain the decision; although the chancellor says it is a well settled principle of law in relation to contracts regulating the rights of property consequent upon a marriage, so far, at least, as personal property is concerned, that if the parties marry with reference to the laws of a particular place or country as their future domicile, the law of that place or country is to govern as the place where the contract is to be carried into effect. This is but another illustration of the rule that in certain cases, the law of the place where the contract is to be performed, may be resorted to, to determine the rights of the parties, when the parties contract with reference to such a law.

The cases of *Pomeroy v. Ainsworth*, (22 Barb. 119,) and *Cutler v. Wright*, (22 N. Y. 472,) belong to the same class, and do not invalidate the general rule above referred to.

If I am right in these views, the result is, that the bonds are void for usury as to the defendant, who guarantied their payment.

It is proper to add, as I have already intimated, that I do not concur in the former decision of this court, which permits the guarantor to set up a defense which the corporation is prohibited from interposing to the same bonds. If my brethren are of opinion that the case of *Hungerford Bank v. Dodge* is open to review, in consequence of the later decisions in the Court of Appeals, which have been supposed to hold a contrary doctrine, I shall be willing to unite in affirming the judgment on this appeal, upon the ground that there is no usury in the bonds of the corporation, the statutes of this State having repealed the usury laws, as to corporations.

And I am unable to discover the principle upon which the contract of the guarantor is to be held void for usury, when there is no usury in the obligation which is guarantied.

Since writing the foregoing opinion, it is announced that in the case of *Rosa v. Butterfield*, in the Court of Appeals,

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(33 N. Y. 665,) it was decided that the guarantor could not avail himself of the statute. The judgment must therefore be affirmed.

BACON, J., concurred.

MULLIN, J., (dissenting.) I cannot agree with the respondent's counsel that because corporations are forbidden to set up usury as a defense, therefore the usury laws are, as to them, repealed, and that, not only is the benefit of the defense taken from the corporation, but also from all persons who are parties to their contracts. My reasons for this opinion are,

1st. That the statute does not, in terms or by fair implication, extend the prohibition beyond corporations.

2d. The reasons which induced the enactment of the law do not require the prohibition to be extended to individuals.

3d. Every argument in favor of the adoption of laws against usury, requires the enforcement of those laws in cases where individuals are sued, who are parties to corporate contracts.

Experience has shown that corporations cannot borrow money on as favorable terms as individuals. This results, in part at least, from the neglect of the officers and agents, in the care and management of their affairs, and a want of attention to the prompt collection of debts due to, and the prompt payment of debts from, corporations, so that a greater risk is assumed in loaning to them than to individuals, and this risk must be compensated by a higher rate of interest. Again; while corporations may, and doubtless do, suffer from the effects of usury, yet it is not attended by the same results as in the case of individuals. The one suffers in purse, the other in both mind and purse. While both may become poor, the corporation is not made a slave; it has no children to clamor for bread; no visions

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of alms houses invade its sleep, or haunt the imagination when awake. There is a difference, a vast difference, in the mischief resulting from grinding the face of a poor corporation and of a poor man. The former has neither heart nor soul; the latter has both, and other hearts besides his own, for which he is bound to care and feel. If it be true that the credit of a corporation is not equal to that of individuals with an equal amount of capital, it must pay higher interest or go without money. The interests of society are so interwoven with corporations, they have become so essential to the business of every community, that they cannot be dispensed with. To make it necessary that private credit should be added to that of the corporation, in order to secure the lender and induce him to loan, necessarily involves all persons who may thus lend their credit in the affairs of the corporation, thereby increasing the extent of the misfortunes resulting from failure of the corporation, or subjects its stockholders to the payment of exorbitant demands for commissions paid to such sureties. These consequences are, to a considerable extent, avoided by enabling corporations to go into the market, and sell their paper at what it may be worth, without exposing the purchaser to the penalties of usury.

If, notwithstanding this law, corporations are unable to borrow money without calling in sureties, the very end and aim of the statute is defeated. The usurer, in his demand of security for a loan, is as ravenous as the hungry wolf. Like the daughter of the horse leech, his cry is give, give. If it be true that the statute has not only taken from the corporation the right to plead usury, but from all who may have become parties to its contracts, the usurer has achieved a triumph that, I trust, the legislature did not anticipate, or intend to secure to him. For myself, I never can be induced to believe that the legislature contemplated any such shameful results. But whatever

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our opinion may be on this subject, this court, in at least two cases, has held that the prohibition does not extend beyond the corporations. (*Hungerford Bank v. Dodge*, 30 Barb. 626. *Rosa v. Butterfield et al.*, not reported.)

2d. I agree with the respondents's counsel, that the contract should be regarded as made in Illinois, and in reference to its laws, *so far as the laws of that State regulate the power of the corporation to contract, or the manner of executing contracts.* (*Bard v. Poole*, 2 Kern. 495.) A corporation created in Illinois and authorized by its charter to loan or borrow money, may make the contract in any other State which permits foreign corporations to enter into such contracts within its jurisdiction, and the contracts made in the foreign State, if they are to be performed there, will be governed by its laws, and not by the laws of Illinois. But if the contract is one which, by its charter, the corporation cannot make, it is utterly void, notwithstanding it may be lawful in the State in which it is made. (*Bard v. Poole*, *supra*.) In a certain sense, therefore, every contract made by a foreign corporation in this State, which is to be performed here, is made in reference to the laws of the State creating the corporation. In other words, the law creating the corporation must be resorted to, everywhere, to ascertain the powers conferred upon it. But though the act of incorporation may prescribe the rate of interest which the corporation may charge, yet in a contract made in another State, and to be performed there, a different rate of interest may lawfully be contracted for.

3d. There is no doubt but that the contract in this case was actually made in this State, and was to be performed here. In *Curtis v. Leavitt*, (15 N. Y. 9,) part of the bonds, which were the subject of the contract in that suit, were delivered in England, payable in English currency; the interest was to be paid there, and certain persons residing there were appointed to act in reference to them, and the

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agreement to take the bonds in advance of their delivery was made in England. These circumstances were relied upon by the Court of Appeals, as establishing the fact that the contracts were English, and not New York contracts, where the corporation was created and transacted its business. Within the principle of the case of *Curtis v. Leavitt*, this was a New York contract, and governed by its laws, and not those of Illinois.

4th. It is settled, beyond all room for argument, that contracts are governed by the laws of the country where they are made, unless they are, by their terms, to be performed in some other country, in which event the laws of the latter country apply. (*Pomeroy v. Ainsworth*, 22 Barb. 118. *Jacks v. Nichols*, 1 Seld. 178. *Bard v. Poole*, 2 Kern. 495. *Davis v. Garr*, 2 Seld. 124) This rule is clear, comprehensive, and easily applied, and governs this case, unless there is some modification of, or exception to it, which is so authoritatively established that we are not at liberty to disregard it.

The modification or exception insisted upon is, that where a contract is made in one State or country, to be performed in another, in which the rate of interest is not the same, the parties may agree for the payment of either, and the contract is not usurious in the State whose laws forbid the taking of the rate of interest provided for in the contract, and declare the agreement for such interest to be usurious and void. This doctrine rests, so far as I can find, upon two decisions of the chancellor of this State, one case in Louisiana, and an elementary work of *Parsons*, being his treatise on *Contracts*. If there is any other case or dicta supporting the exception, I have not been able to find it.

In *Chapman v. Robertson*, (6 Paige, 627,) the question was, whether a mortgage was usurious under the law of England, given on property in this State, to secure a loan made in England, and which was to be repaid in England,

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the rate of interest being seven per cent, while the rate in England was five. The chancellor held that the mortgage being given on property in this State, was governed by the laws of this State, and hence, seven per cent being the lawful rate of interest here, the mortgage was valid.

While the principle thus asserted may be assented to; without overruling or qualifying the general rule that the law of the place designated by a contract for its performance governs its construction, yet I cannot yield my assent to the doctrine. The general rule of law is so simple, comprehensive, and easy of application, that it should not be abandoned nor modified, nor should exceptions to it be admitted, unless the ends of justice imperatively require it. The interests of business men are much better secured by courts establishing and enforcing rules that are easily understood and applied to the daily affairs of life, than by attempting to attain perfect justice by the multiplication of exceptions to, and qualifications of, them. The moment it is left in doubt whether a contract is to be governed by the laws of the State where it is made, or where it is to be performed, no man knows what law will be applied in any given case, and litigation and contention are introduced without the slightest benefit to any person. In the case cited, the loan was made in England, and, as the chancellor concedes, it was to be performed there. It was undoubtedly an English contract, and as it provided for seven instead of five per cent, it was, by the laws of England, usurious and void. Now the principal contract drew after it the collaterals; they were part and parcel of the contract for the loan, and stood or fell with it. It is not denied but that the mortgage, as to its form, manner of execution, and the nature and extent of the lien, and as to the remedies by which it might be enforced, was governed by the laws of New York, where the land lay. But this was the whole extent of the operation of these laws. So far as the validity of the mortgage depended on

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the validity of the contract of loan, it was governed by the laws of England, and if the original contract was usurious and void, the collaterals were also void. The chancellor did not intend to overturn this principle, which has been so long and so well established.

In *Dewar v. Span* (3 T. R. 425,) it was held that a bond given in England, payable in England, reserving a greater interest than was allowed in England, was usurious. The bond was given to secure the purchase money of land in the West Indies. Counsel insisted that it was valid under the statute 14 George 3, chap. 79, which provided that mortgages and other securities respecting lands in Ireland and the West Indies, reserving interest allowed in those countries, should be valid though executed in England. The court held that the statute did not apply to personal contracts. While the case itself is an application of the general rule for which I contend, the act to which the counsel and court refer, is a parliamentary adjudication that without the statute mortgages and other securities on land in Ireland and the West Indies would have been void for usury, where more than the English rate of interest was reserved. If such was the law, the remark of Lord Kenyon, in the case cited, that if the present attempt were to succeed it would sap the foundation of the statutes of usury, was strikingly forcible and just. Statutes like the one referred to are never passed by the British Parliament until there is a necessity for them, and then only after the terms of the law have been approved by eminent lawyers, who know what the law is, and who fully understand what change or alteration is required. It was for these reasons that a law changing the common law, becomes high evidence of what the common law was before the alteration was made.

In *Stapleton v. Conway* (3 Atk. 727) it was held that a mortgage on land in the colonies, if executed in England and connected with a bond or other personal covenant for the

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payment of more than seven per cent interest, was usurious. This case is in direct conflict with *Chapman v. Robertson*. The two cases cannot be reconciled.

I submit, in view of these authorities, it is incumbent on those who seek to make an exception to the general rule, to furnish some reason why it is attempted to be made. They should show that the exception ought not to be, and in justice cannot be, reasonably and fairly within the general rule. But not a reason is assigned, nor argument furnished, why an exception should be made.

In *Pratt v. Adams* (7 Paige 615, 631) the facts were, that drafts were drawn by Rathbun on Jones, payable in the city of New York, one at sixty, and the other at ninety days, and accepted by Jones. These were discounted in Ohio for the benefit of Rathbun. One objection to their payment was that they were usurious. The usury consisted in the bank, by which the drafts were discounted, reserving six per cent discount, and Rathbun agreed to keep the bills in circulation until the maturity of the drafts, but if not, then he was to furnish the funds to pay them. If these were Ohio contracts, they were void if the rate of interest was only six per cent, as by the contract the bank was to receive, not only its interest, but the benefit of the circulation of the bills paid out on discounting the bills, in addition thereto. Such a benefit in addition to lawful interest, was usury. Under the general rules relating to the construction of contracts, the bills were not governed by the laws of Ohio, but by those of New York, where they were payable. This disposed of the question of usury, so far as Rathbun was concerned. It was wholly unnecessary for the chancellor to go further and express an opinion on a question not before him. Indeed he clearly shows that if the contract was to be deemed to be an Ohio contract, there was not sufficient proof before him to enable him to pronounce it usurious; so that in no view of the case was he called on to give an opinion on

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the question whether the rate of interest of either Ohio or New York might have been agreed upon without rendering the contract usurious. But if the question was before him, he does not discuss it, but refers to the decision in Louisiana, and expresses his concurrence in it, without assigning any reason why he concurred. In neither of the cases cited has the question been decided, and we are at liberty to dispose of the question unembarrassed by any authoritative decision. But when so learned and able a jurist as Chancellor Walworth has examined a question of law and declared his opinion upon it, every judge will hesitate long before he will differ from him; much longer before he will overrule him. But believing as I do that he was in error, I cannot yield to a mere *dictum*, while I would concur in his decision of a question of law, though I might not be convinced of its correctness. The learned chancellor rests himself upon *Depeau v. Humphreys* (20 *Martin*, 1.) That case I have not seen, but taking the statement of it given by the chancellor and by Judge Story in his *Conflict of Laws*, the precise question now under consideration, was there examined and decided. Story dissents from the doctrine of that case, and it is not supported by a single decision in any common law court of this country or of England. The reasons why it should not be followed are elaborately stated in the *Conflict of Laws*, and I will not attempt to add to the arguments there presented.

I have referred to 2 *Pars. on Cont.*, as an authority in support of the position of the chancellor. But as no reason is furnished in support of the author's opinion, we have added only the weight of the *dictum* of a very distinguished jurist, whose opinion commands the highest respect of the profession, both at home and abroad. The question is not one of opinion merely. It is one in regard to which the reason must be convinced; as, if established, the usury laws will be, in an important class of cases, re-

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pealed, and doubt thrown upon the construction of contracts which the safety and convenience of business men require should be left undisturbed. It is folly to suppose that the law against usury will be preserved by enabling parties alleging usury to show, as is suggested by Chancellor Walworth, that the contract was made with intent to evade the usury laws of the State whose usury laws have been violated. The difficulty is, the burthen of proof is thrown upon the wrong party. The agreement should be held presumptively usurious, and require the party asserting its validity to prove the facts that would make it so. There has rarely been a case in which an agreement or course of dealing has been held presumptively valid, but the right was given to show that it was intended as an evasion of the statutes against usury, but in a short time, it ripened into an established right, and the poor privilege of proving that the agreement was entered into with intent to evade the laws against usury, afforded no protection to the victim of the usury.

I am constrained to vote for reversing the judgment, and granting a new trial, with costs to abide the event.

Judgment affirmed.

[ONONDAGA GENERAL TERM, January 2, 1866. *Mullin, Morgan and Bacon*, Justices.]

In the matter of the BLOOMFIELD AND ROCHESTER NATURAL GAS LIGHT COMPANY *vs.* DAVID H. RICHARDSON and others.

The Rochester and Bloomfield Natural Gas Light Company was incorporated under the general gas companies' statute of 1848, for the purpose of utilizing the natural gas flowing from a gas spring or well in the town of Bloomfield, county of Ontario. By a special act of the legislature, passed May 9, 1870, it was authorized to conduct the gas from said well to any city, town or village within thirty miles of that point, by mains, to sell and supply gas for lighting the streets, public parks, dwellings and other buildings therein. It was further authorized to take private property for any of its purposes, and in a proceeding to acquire such private property it was directed to follow the provisions of the general railroad act. The statute declares that any real estate so acquired, for the purposes aforesaid, shall be deemed to be acquired for a public use. The corporation undertook to conduct gas to the city of Rochester, a distance of about thirty miles from its well. In a proceeding to acquire the right of way for its mains through the lands of private owners, and to appoint commissioners of appraisal, it was held, that the purposes, objects and business of this corporation were a "public use," within the meaning of the constitution; and that the statute authorizing it to take private property for the purposes of its said business was constitutional and valid.

The power to exercise the right of eminent domain, where such right exists, may be conferred upon a corporation acting in its own interests, and for purposes of private gain.

In order to constitute a "public use," within the meaning of the constitution, it is not necessary that the improvement should directly benefit the people of the whole State, but the direct public benefit contemplated may be confined to a particular community.

When the use to which private property is to be appropriated is a public one, the legislature is the sole judge of the necessity or expediency of the appropriation.

In general, the legislature is the sole judge of what constitutes a public use. But to a very limited extent, the constitutionality of a statute purporting to confer the right to take private property for public use, is a judicial question. If the effect of a statute is to divest one citizen of his property for the benefit of another, without the semblance of any public benefit, or when the absence of all pretense of public benefit is clear and palpable, it will be the duty of the courts to declare the act unconstitutional and void, not as an unauthorized taking of private property for public use, but as an attempt to take it for private use. But in order to authorize the court to interfere, it must be clear and manifest that no public use was contemplated.

The provision of the constitution in question does not purport, and was not designed, to define or limit the nature of the use for which private property

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can be taken, but only to require, absolutely, that in all cases where the property is taken for a public use, just compensation shall be provided for and made.

It seems that if any business or enterprise can fairly be supposed to be a matter by which the public of a particular community, or various communities, may be benefited, or if it has for its object, or one of its objects, a matter which may be for the public benefit, or which may constitute a public improvement, then such business or enterprise is a "public use," within the meaning of the constitution, although the parties engaged in it may be actuated solely by the inducement of private gain.

A PPEAL, by the defendants, from an order of the special term of Monroe county, appointing commissioners to appraise the compensation to be paid to Richardson and Calkins, for the right to lay a gas main in the highway in front of their premises, leading from Henrietta to Rochester.

John Norton Pomeroy, for the appellants.

The statute authorizing the petitioner to take private property, even upon a full compensation, without the consent of the owners, is utterly null and void. The business, the purposes and the objects of the petitioner are not a "public use" within the meaning of the constitution, which authorizes private property to be taken upon making compensation.

The following principles have been so firmly settled that no extended argument upon them is necessary.

A. When the purpose for which private property is to be taken is confessedly a "public use," the legislature is the sole judge as to the expediency, the propriety, the necessity of the taking; the courts must obey the legislative mandate. But when the question is *whether the use is a public one or not*, the decision of the legislature is not final. Whether the use to which private property has been or is to be appropriated, is "public" or not, is purely a judicial question, and must be determined, in each case, by the courts, if a proceeding involving the question

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arises. Any other construction would render the constitutional restriction a nullity, and would leave the legislature omnipotent to appropriate private property for any purpose which it chose to call "public" in a statute. Although there are a few dicta which seem to hold the other way, and especially an observation of Chancellor Walworth in an early case, yet this doctrine is now settled by the overwhelming weight of authority, as well as on principle. (*Talbot v. Hudson*, 16 Gray, 417, 421. *Sadler v. Langham*, 34 Ala. 311, 326-328. *Bankhead v. Brown*, 25 Iowa, 540. *Concord R. R. v. Greely*, 17 N. H. 47, 57, 61. *Coster v. Tide Water Co.*, 3 C. E. Green [N. J.] 54, 63-71. *Harris v. Thompson*, 9 Barb. 350, 362. *Matter of Townsend*, 39 N. Y. 171, 174, 181, 182. *Am. Law Review*, No. for January, 1872, pp 197, 198, *et seq.*)

B. The taking or appropriation of private property need not be made by the government—the legislature—directly, but the right may be assigned or delegated to corporations or to private persons. This doctrine was established after much struggle, but is now too firmly settled to be questioned. It should be remembered, however, that the delegation may be to private persons as well as to corporations. Corporations possess no such capacities as make a use in their hands "public," which would not be equally so in the hands of any individual person. (*Bloodgood v. M. and H. Railroad Co.*, 18 Wend. 9,) and many other cases.

C. The use, in order to be "public," need not be for the benefit of the State, in its organic capacity; but it is sufficient if it be for the benefit of the individual persons who form the political society. Senator Tracy strove manfully, in *Bloodgood v. R. R. Co.*, (*supra*), to establish the contrary doctrine, but failed. This one doctrine has made private property more precarious in the United States than in any other civilized country. It is the plain

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duty of the courts to see that it be not so extended as to destroy the constitutional limitation.

Assuming the foregoing principles, I proceed to inquire what uses are public, and what are not.

I. The following, and they only, have been held to be public, within the meaning of the constitutional provision. I separate them into groups or classes, so that the general principles upon which each case rests may be clearly seen and distinguished.

1. All purely governmental purposes, whether carried on by the State itself, through some of its departments, or by local governments, such as those of counties and towns. Under this class it has been held that private property may be taken for a public school-house, (*Williams v. School District*, 33 *Vt.* 271;) for a fort, (*Gilmer v. Lime Point*, 18 *Cal.* 229;) and this class would undoubtedly include buildings for state-houses, capitols, court-houses, public prisons and the like.

2. All means and methods for transit of passengers or goods, whether constructed by the State, like the Erie canal, or by private enterprise, like most railroads. This class includes public highways, turnpikes, bridges, railroads, canals, docks and wharves.

It is plain that in every possible instance, under this class, the use is for the whole public, and not for any definite or indefinite limited portion of it; because, although as a matter of actual experience, persons living near the structure use it and are benefited by it more than others, yet none are or can be shut out from its use. Every individual may travel over these means of transit, or use the wharves, and has a common law right to do so, either without toll of the bridge or highway, &c., free, or by paying the customary toll or fare in the cases where that is legally required. It is an entire perversion of terms, and a complete confusion of legal ideas, to say of any highway or bridge however local, that it is for the use only of the

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community which surrounds it. The shortest and most unfrequented highway is for the use and benefit of the whole State. (*Bloodgood v. R. R. Co.*, 18 *Wend.* 9. *Swan v. Williams*, 2 *Mich.* 427. *Concord R. R. v. Greely*, 17 *N. H.* 47. *Arnold v. Bridge Co.*, 1 *Duvall*, [*Ky.*] 372,) and many other cases.

3. Measures of police, and especially those which are designed to promote health. In this class there are several particular instances, not resembling each other in their outward and physical features; but it will be seen that in all of them the element which makes the use "public," belongs to that branch of governmental functions termed police, and in most of them this element is purely sanitary. This class includes,

(1.) Water works to supply cities with water. Health—the necessity of pure and wholesome water as much as of pure and wholesome air—and not mere convenience, and emphatically not gain, is the public use which renders these works and enterprises valid. (*Reddall v. Bryan*, 14 *Md.* 444. *Burden v. Stern*, 27 *Ala.* 104. *Lumbard v. Stearns*, 4 *Cush.* 60. *Mayor &c. v. Bailey*, 2 *Denio*, 452, *per Gardiner, President.*)

(2.) Provisions and means for draining swamps, marshes and low lands. (*Hartwell v. Armstrong*, 19 *Barb.* 166. *People v. Nearing*, 27 *N. Y.* 306. *Anderson v. Kerns Draining Co.*, 14 *Ind.* 199, 202.) This last case expressly holds that draining for sanitary purposes is a public use, but for other purposes is not.

(3.) Provisions and means for removing dams and permitting stagnant and offensive waters to flow off, thus abating a great public nuisance, and rendering a whole district salubrious which was before pestilential. (*Miller v. Craig*, 3 *Stockt.* [*N. J.*] 175. *Talbot v. Hudson*, 16 *Gray*, 417. *Dingley v. Boston*, 100 *Mass.* 544.)

(4.) Drains and sewers in cities. (*Hildreth v. Lowell*, 11 *Gray*, 345.)

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(5.) Public burying grounds. (*Edwards v. Stonington Cemetery Ass.*, 20 Conn. 466.)

The cases generally, that is, throughout the United States, go no further than the foregoing; but,

4. In Massachusetts, Connecticut, and perhaps in a very few other States, statutes have existed from an early day, known as the "flowage acts," by which land is permitted to be taken for mill-dams, &c. These statutes form part of the peculiar local systems of those states, and have been sustained on the ground that the means of promoting manufactures was a public use. See *Hazen v. Essex Co.*, (12 Cush. 475;) *Boston Mill-dam Co. v. Newman*, (12 Pick. 467,) and many other Massachusetts cases; *Olmstead v. Camp*, (33 Conn. 532;) *Todd v. Austin*, (34 id. 78.)

These doctrines have not been followed to any extent in other States. In Alabama a similar statute was recently declared void, although it had stood for a long time. (*Sadler v. Langham*, 34 Ala. 311, 323, 325, 326-328, 330.) In Tennessee a very early case had held that a grist-mill was a public use, but that a saw-mill or a paper-mill was not. (*Harding v. Goodlett*, 3 Yerger, 41.) And even the former part of this decision was recently overruled in (*Memphis Freight Co. v. Memphis*, (6 Cold. [Tenn.] 419.) Finally, this New England doctrine has been expressly repudiated in New York, (*Hay v. Cohoes Co.*, 3 Barb. 42, 47;) and see on the special subject, *Cooley's Constitutional Limitations*, p. 534.

II. The business, objects and design of this gas company do not make it a "public use," within the principles of any of the foregoing classes, nor within the doctrines of any authoritative decision.

1. "Public use" means something more than public convenience, public benefit, or public interest. It implies and includes a notion of necessity, of exigency. Much stress is laid, by the respondent, upon the fact that the "use" need not be for the whole people of the State; that

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it may be for a limited portion of that people and still be "public." This is true; but from the foregoing classification it is made plain in just what cases the use may be for a limited number and still be public. The criterion is found in the nature of the use itself. It is utterly untrue that any and every kind of use may be necessarily confined to a limited portion of the people of the State, and yet be "public." The classification which I have made enables us to draw the dividing line, as follows; and I submit this as an accurate generalization of the doctrine. The object, to be a public use, must either be, (1,) something which, *ipso facto*, by its mere existence, and of necessity, produces some great common good to all the inhabitants of a particular district, such as sanitary measures for draining, water supply, and the like; or, (2,) it must be something in which the public at large—that is, every individual if he pleases—has a legal interest and right, such as a highway, railroad, and the like; or, (3,) it must be something directly governmental, such as a fort, a state-house, and the like. I submit, that these three general divisions include and exhaust all possible cases. In the first of them alone can the use be limited to a defined portion of the State.

If we go beyond these, we cannot stop short of every trade, business, manufacture, profession and occupation, by means of which divers individuals and communities are accommodated. The moment we break over the line which I have indicated, and which the cases recognize with greater or less distinctness, we cannot logically stop short of any and every lawful trade or calling. In addition to the cases cited above, see in particular the following, in which the nature of a public use is discussed at large, and which fully sustain my position. (*Gilmer v. Lime Point*, 18 Cal. 229, *per Baldwin, J.*, 251, 252. *Cosster v. Tide Water Co.*, 3 C. E. Green, 54, *per Zabriskie, Ch. J.*, 63–67. *Memphis Freight Co. v. Memphis*, 4 Coldwell,

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419, 423, 425. *Bankhead v. Brown*, 25 Iowa, 540. *Sadler v. Langham*, 34 Ala. 311, 323, 325.)

To the foregoing positions, so fully supported by reason and by authority, there are opposed two recent flowage cases in Connecticut. (*Olmstead v. Camp*, 33 Conn. 532, and *Todd v. Austin*, 34 *id.* 78.) In the latter case the necessities of the position, and the logic of the judge forces him to hold, and he does hold without wincing, that "whenever a person carries on any business, and furnishes articles which members of the community find it convenient or advantageous to buy, then his business is a public use." This is the *reductio ad absurdum*. It is saying that the legislature may empower a person to take private property to carry on every trade or occupation conceivable. It utterly abolishes the word "public" from the constitutional provision. Yet to this conclusion the court must come, this doctrine it must adopt, if it passes beyond the simple rules and criteria which I have indicated, and holds the petitioner entitled to take our property.

2. There is nothing in the nature of the petitioner's business which makes it a public use. It is simply, at most, a convenience to certain persons dwelling in Rochester, where there is already a supply of gas. It is perhaps more convenient to use gas than candles, or sperm oil, or even kerosene oil, and that is the whole of it. The same doctrines which enable the petitioner to take private property in order to facilitate its business, would have enabled the manufacturer of mould candles to take private property because his commodity was an improvement upon the old fashioned dip, or the seller of sperm oil to take private property because his commodity was more convenient to use than candles.

There is no resemblance between this case and that of a water supply. Water is an absolute necessity, not a convenience; it is a sanitary necessity.

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Nothing can be said in favor of the petitioner's right which would not apply with equal force to every kind of manufacture, to every kind of lawful business, to banks, to mercantile stores, to taverns, and to a thousand other pursuits.

If the petitioner can take its right of way through our lands, then every gas company could have power to condemn private property for its works, offices, &c., which has never as yet been attempted, nor claimed; nay, the petitioner could have power to take the gas well at Bloomfield from its owner, or even to take the whole property of the Rochester gas company to its own use; because if the use be public, there is no limit to the amount or nature of the property which may be taken. In this manner the pretended right is tested, and the statute conferring it is shown to be void, because it necessarily leads to such consequences.

I submit, that the order appealed from should be reversed, and the petition for the appointment of commissioners of appraisal should be denied.

Theodore Bacon, for the respondent, cited *Beekman v. Saratoga and Schenectady R. R. Co.*, (3 *Paige*, 45, 73-75;) *Bloodgood v. Mohawk and Hudson R. R. Co.*, (18 *Wend.* 9, 13-16;) *Buffalo and N. Y. R. R. v. Brainard*, (5 *Seld.* 100, 109;) *The People v. Smith*, (21 *N. Y.* 595;) *Lumbard v. Stearns*, (4 *Cush.* 60;) *Gilmer v. Lime Point*, (18 *Cal.* 229.) It was also maintained by counsel, that the corporation petitioner, being given, by special act of the legislature, (*Laws of 1870, ch. 757, p. 1878*), and by the general law, (3 *Edm. Stat.* 852, § 18,) the right to lay its pipes in highways, both in the city and the country, might lawfully do so without acquiring further rights from adjoining proprietors; but it was conceded that the claim could not be asserted in these proceedings instituted by itself.

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By the Court, TALCOTT, J. The respondent is a corporation, created under the act of 1848, to authorize the formation of gas companies. The object of the formation of the company was to utilize the illuminating and combustible gas, naturally flowing from what is termed a gas well, situate in Bloomfield, in the county of Ontario, and about thirty miles from the city of Rochester. By an act passed May 9, 1870, to grant additional powers to the Bloomfield and Rochester Natural Gas Light Company, it is provided that the company, in addition to the powers and franchises conferred upon it by the general statute, and the acts amendatory thereof, should have the right and power to conduct the gas from said gas well to any city, town or village within thirty miles therefrom, and situated within the counties of Ontario, Livingston or Monroe, by mains, conduits or pipes in any such city, town or village, to sell and supply gas for lighting the streets, public parks, dwellings and other buildings therein; and that in any such city, town or village, to or through which the corporation should conduct its gas, it should have the rights and powers conferred by section 18 of the said general statute, and the acts amendatory thereof, the same, to all intents and purposes, as if said gas were manufactured, and said corporation thus located, and its business operations conducted, in said respective cities, towns or villages. The act further provides that, in case it shall be necessary for the corporation to take private property for said purposes, and it cannot agree with the owners and occupants, then such proceedings may be had, for the purpose of acquiring the right to take such property for any purpose authorized by this act, or the said general law, as is provided for acquiring the title to real estate by railroad corporations, under the provisions of the general railroad act; and that any real estate so acquired for the purposes aforesaid, shall be deemed to be acquired for public use.

The corporation is engaged in the enterprise of convey-

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ing the gas from the well to the city of Rochester, and for such purpose desires to lay its mains under the surface of a highway leading from Henrietta to the city of Rochester. The appellants are the owners of certain lands along which the highway passes, and own the fee of the land in front of their premises, to the center of the highway.

The corporation desires to lay its mains under the surface of that portion of the highway the fee of which is in the appellants, and has been unable to agree with the appellants as to the amount of compensation to be paid to them for the right and privilege. The corporation, therefore, applied to the special term for the appointment of commissioners of appraisement, in the manner prescribed in the general railroad act. An order appointing such commissioners was made by the special term, from which order the appellants appeal.

On this appeal, the question presented is, whether the right thus sought to be acquired by the corporation is a public use, so that the legislature is authorized in furtherance of it, to exercise the right of eminent domain, and to confer the power to exercise that right upon the respondent. Most of the principles involved in the discussion of this appeal have been authoritatively settled.

In *Bloodgood v. The Mohawk and Hudson River R. R. Co.*, (18 *Wend.* 9,) it was settled by the court of last resort that the power to exercise the right of eminent domain, where such right exists, may be conferred upon a corporation, acting in its own interests, and for purposes of private profit. In that case the principle was declared in a resolution adopted by the court, and afterwards made a part of its judgment, in the following words: "It is declared and adjudged that the legislature of this State has the constitutional power and right to authorize the taking of private property for the purpose of making railroads and other public improvements, paying the owners of said property full compensation therefor, whether such public

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improvements are made by the State itself, or through the medium of a corporation or joint stock company." The same doctrine had been previously declared in *Beekman v. The Saratoga and Schenectady R. R. Co.*, (3 Paige, 45.)

This power had been assumed by the legislature from time to time, from the early history of the State. For instance, in 1792 the legislature conferred the right of eminent domain on certain lock navigation companies. (2 Greenl. Laws of N. Y. 427.) In 1825 the Granville Canal Company was incorporated with the right of eminent domain. (Laws of 1825, p. 306.) Since this power began to be exercised by the legislature, two new constitutions have been created, without any change in the provision by which the right to take private property for public use is limited. And the constitution of 1846 was framed and adopted subsequent to the formal adjudication of the court of errors which has been referred to, and which attracted much professional and general attention at the time. So that it may be considered as settled, in this State, that the right to take private property for what is a public improvement, may be conferred upon any parties who are, or propose to be, engaged in the making of such improvement.

It is equally well settled that in order to constitute a public use, within the meaning of the constitution, it is not necessary that the improvement should directly benefit the people of the whole State; but the direct public benefit contemplated may be confined to a particular community. Such is the case in regard to many highways, and especially in cases where the right to exercise the power of eminent domain in the particular case has been conferred upon persons authorized to conduct water from a distance to supply particular localities, and the case of grounds taken for burial places. (See act of May 9, 1870.) Nor is it essential to the exercise of this right that

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the taking of the property in question should be absolutely necessary to accomplish the object.

It is said by the chancellor, in the case of *Beekman*, before referred to: "It belongs to the legislature to determine whether the benefit to the public is of sufficient importance to justify their exercise of the right of eminent domain in thus interfering in the private rights of individuals. * * * But if the public interest can in any way be promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. It is upon this principle that the legislatures of several of the States have authorized the condemnation of the lands of individuals for mill sites.

Upon the same principle of public benefit, not only the agents of the government, but also individuals and incorporated bodies, have been authorized to take private property for the purpose of making public highways, turnpikes, roads and canals, of erecting and constructing wharves and basins, of establishing ferries, of draining swamps and marshes, of bringing water to cities and villages. In all such cases, the object of the legislative grant of power is, the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, through the medium of corporate bodies, or of individual enterprise." The principles stated by the chancellor, as quoted, were afterwards substantially reiterated by the court of errors in the case of *Bloodgood*, (*supra*), and again by the Court of Appeals in the *Buffalo and N. Y. R. R. Co. v. Brainard*, (5 *Seld.* 109,) where it is said: "It belongs to the legislative power of the government to determine for what public purposes private property shall be taken, and the necessity or expediency of such appropriation."

These principles undoubtedly constitute the law of this
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State, and furnish the rule by which the provision of the constitution limiting the right to take private property for public use is to be interpreted. Unquestionably, to a certain limited extent, the constitutionality of an act of the legislature assuming to confer this right, is a judicial question. That is to say, a case may be supposed, in fact such cases have arisen, where the legislature has assumed to pass enactments, the effect of which, if valid, was merely to divest one citizen of his property for the benefit of another, without the semblance of any public benefit. When such a case arises, where the absence of all pretense of public benefit is clear and palpable, it will be of course the duty of courts to declare the act unconstitutional and void, not as an authorized taking of private property for public use, but as an attempt to take it for private use. But in order to authorize a court thus to interpose its veto upon a legislative act, it must be clear and manifest that no public use was contemplated, or public benefit is to result.

The provision of the constitution referred to, does not purport, and was not designed, to define or limit the nature of the use for which private property can be taken, but only to require absolutely that in all cases where the property was taken for a public use, just compensation should be provided for and made.

If these suggestions are correct, it will be seen that the power of the court, on questions of this character, is circumscribed within very narrow limits. If the act which confers the right to take private property has for its objects, or one of its objects, the promotion of an enterprise which we can see may be for the public benefit, or in the language of the judgment of the court of errors, may constitute "a public improvement," and it at the same time provides for the payment of a full compensation to be ascertained in the manner pointed out by the constitution, the power of the legislature to make the law must be

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affirmed, whatever may be thought of the propriety of its exercise.

We have, then, only to inquire, in this case, whether the object for which the power to exercise the right of eminent domain has been attempted to be conferred upon the "Bloomfield and Rochester Natural Gas Light Company," is one which, although the parties engaged in the enterprise may be actuated solely by the inducement of private gain, can yet fairly be supposed to be a matter in which the public of a particular community, or various communities, may be benefited.

As we have seen, the object of the act conferring the special powers upon this company, is to authorize the conducting of the gas from the natural gas well to any city, town or village within a certain distance and there to sell and supply the gas for lighting the streets and public parks, as well as dwellings and other buildings.

It is unnecessary, in this case, to enter into any discussion as to whether the lighting of the dwelling of an individual, or any number of such dwellings, for the convenience of the occupants, can be considered a public use, since one of the objects of the act in question is to facilitate the lighting of the streets and public places. Is the lighting of the streets and public places a public benefit? The modern practice of the civilized world answers the question. But it is said that a gas company already exists in Rochester, which is ready to supply all gas which may be needed. The same answer, in principle, might be made to almost any attempt to take any particular property for any particular public use. In almost all cases, it could be demonstrated that the particular method by which the legislature has attempted to authorize the public benefit to be conferred, or the particular property proposed to be taken, is not absolutely necessary to the accomplishment of the object. If the court can see that a public benefit is contemplated, the mode and method and

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means of producing this result must belong to the legislature to be authorized in its discretion. It may be that the quality or price may influence the legislature to select one method over another. It must be a matter wholly resting in legislative discretion, or else the power is nugatory.

Side by side with the gas mains of this company, leading to the city of Rochester, and, as was stated on the argument, at the very locality where the question in this case arises, are also placed the main conduits of the "Rochester Water Works Company," upon which the legislature conferred the right to conduct water from a distance for the purpose of supplying the city with water, together with the power to take such private property as should be necessary in accomplishing the object.

This court has had occasion to confirm an appraisal of damages under the provisions of the water works charter conferring the right to take private property.

But it might well be alleged that Rochester might be supplied with water from other sources, and even within the city itself. The use of gas for illuminating purposes has become almost a necessity of modern civilization. The right to take the private property of those who own the fee of streets and highways may be absolutely necessary to the public enjoyment of the benefits of this invention, and we think there can be no doubt, upon principle and upon the adjudicated cases, that the conduction of illuminating gas, with such public objects as are specified in the act conferring the special powers upon this company, is within the category of those public improvements to enable which to be carried out, the legislature may confer upon the parties engaged in the enterprise, the right to take the private property necessary to effect the object, upon making compensation according to the constitution.

It is a somewhat remarkable circumstance that the legislature has never yet, so far as we can discover, found it

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necessary to confer this power upon gas companies using manufactured gas. The general act for the formation of gas light companies, passed in 1848, contains no such power; nor, so far as we have discovered, has it been conferred in any special charter or statute, except in the case of this company, the Westfield Gas Company, (*Laws of 1860*, p. 203,) and the Getzville Mining Company, (*Laws of 1866*, p. 63,) all three of which are companies formed for conducting natural gas to certain localities. We are not aware that any objection has hitherto been interposed by any owner of the fee of a street or highway to the use of so much thereof as is necessary or proper for the conduction and distribution of gas, until this case; yet it is manifest that if the parties objecting, in this case, can succeed in preventing the use of a part of the land in the highway for the purpose here proposed, so may any owner of the fee of any street in a city or town, prevent the use thereof for a like purpose, though the gas be manufactured within the limits of the city or town.

The fact that no such opposition has been heretofore attempted may be taken as evidence, at all events, of very general acquiescence in the proposition that the conduction and distribution of illuminating gas is a public object and for the public benefit. The mere nominal damages likely to be awarded to the owner of the fee for laying a gas pipe under ground through a highway, have not been a sufficient inducement to the parties technically interested to insist on the formality of an appraisal.

As the supposed constitutional objection which has been considered is the only one of importance which is made, to the appointment of commissioners in this case, the order appointing them must be affirmed.

Order appealed from affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Mullin, Johnson and Talcott, Justices.]

GARRETT S. AYRES and others *vs.* MELTIAH H. LAWRENCE
and others, Commissioners of the Town of Milo, and the
Sodus Bay, Corning and New York Railroad Company.

Judgments of courts of law are to be reviewed according to the course of the common law, unless a statute otherwise provides. A suit cannot be instituted in equity to set aside a judgment at law, for want of jurisdiction in the court or judge before whom the proceeding was had and the judgment recovered.

Where the statutes under which a county judge assumed to act, in appointing commissioners to bond a town in aid of a railroad, constituted him a judicial tribunal to hear and determine the questions presented by the petition, and provided that his determination should have the same effect as any judgment of a court of record in the State; *Held* that errors in the determination of the county judge in regard to matters which he had the right to determine and adjudicate upon, could not be corrected by the Supreme Court, in an action brought by tax-payers against the commissioners so appointed and the railroad company, to restrain and prevent the issue of the bonds of the town.

Tax-payers of a town, as such, have no right to an injunction to restrain the issue of town bonds by commissioners appointed for that purpose by a county judge, on the ground that such issue, if allowed to be made, will probably result in increasing the taxation of the town, at some future time; when it is not claimed that the plaintiffs have any interest, except such as is common to all the tax-payers of the town.

It does not alter the principle that the action purports to be commenced in behalf of the plaintiff and all other persons, standing in a like situation, who may desire to avail themselves of it.

The general rule is, that for wrongs against the public, whether actually committed, or only threatened, no private action can be maintained.

As an injury affecting a whole community, when committed affords no ground of action to an individual, so neither can an individual maintain an action to restrain its commission when only threatened.

The interests of one or more individuals, as residents and tax-payers, in and of a municipal community, whether city, county or town, do not authorize the maintenance of an action to set aside, or prevent, illegal acts which may result in increased taxation or other burdens and inconveniences, to which all the members of the community are alike subject.

An act likely to produce taxation is not a matter of private or individual concern.

Proceedings under the "bonding acts" have always been reviewed on *certiorari*; and all objections affecting the legality of the proceedings, or the jurisdiction of the county judge, are available on such review. Express authority for thus reviewing them is given by the act of 1871. (*Laws of 1871, ch. 925, § 4.*) *Per* TALCOTT, J.

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APPEAL, by the defendants, from an order continuing the injunction in this action.

D. B. Prosser, for the appellants.

H. L. Comstock, for the respondents.

By the Court, TALCOTT, J. The order to continue the injunction in this case was made by the county judge of Ontario, upon an order to show cause made by him as a part of the original injunction order made under the 94th rule. Various objections are urged by the counsel for the appellants against the power of the county judge to make this order continuing the injunction. (*See Middletown v. Rondout &c. R. R. Co.*, 43 *How.* 144.) But as a much more important question, and one which ought to be definitely settled, is presented, upon the merits of the injunction itself, we deem it best to waive the discussion of the question of practice in this case, being of the opinion that the injunction ought not to be sustained upon the merits, according to the law as laid down by the court of last resort.

This suit is commenced by three individuals, who allege that they are residents and tax-payers of the town of Milo, in the county of Yates, and own taxable property, both real and personal, therein. The cause of action alleged in the complaint is, that the three persons made defendants, as commissioners of the town of Milo, in Yates county, have been appointed such commissioners by the county judge of that county, under what is known as the town bonding act of 1869, and the acts amendatory thereof, upon the petition of certain tax-payers of that town praying that the town shall issue its bonds to the amount of \$100,000, and invest the proceeds in the stock of the defendant, The Sodus Bay, Corning and New York Railroad Company. They then set forth the proceedings of the county judge

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under the acts aforesaid, and his judgment and determination, whereby he adjudged and determined that the petitioners constituted a majority in number, and owned and represented a majority of the property of the town, and appointing the defendants Lawrence, Schultz and Jones commissioners, to execute the bonds in behalf of the town, and to invest the proceeds in the stock of the company. The validity of these proceedings, by and before the county judge, is attacked upon various grounds, some of which are claimed to go to the jurisdiction of the county judge to act at all in the premises. This suit is commenced to restrain and prevent the issue of the bonds of the town, and the subscription to the stock of the railroad company, and to have the said adjudication of the county judge declared null and void. The plaintiffs allege that the commissioners have not as yet issued any of the bonds, or subscribed for any of the stock, but the plaintiffs are apprehensive they will do so, and that such bonds will ultimately fall into the hands of *bona fide* holders, who will commence actions against the town, and that a large amount of costs and expenses will be incurred by the town in the defense of the actions.

It is not alleged that the investment in the stock of the company would probably be a losing one to the town. It is not alleged that the commissioners, the validity of whose appointment is denied by the complaint, are irresponsible, so that they would be unable to respond for any damages which the town may sustain in consequence of their apprehended unlawful assumption to act as the agents of the town, and to issue bonds in its name. The statutes under which the county judge assumed to act, constitute him a judicial tribunal to hear and determine the questions presented by the petition of the tax-payers, and provide that his determination shall have the same effect as any judgment of a court of record in the State. So far as the complaint alleges errors in the determination of the county

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judge, in regard to matters which he has, and of right might determine and adjudicate upon, it is quite clear that this suit cannot be maintained, and the errors, if any, corrected in this collateral action; and we have been referred to no authority maintaining that a suit can be instituted in equity to set aside a judgment at law, for want of jurisdiction in the court or judge before whom the proceeding was had, and the judgment recovered. The court of chancery has never assumed the power to review the judgments of courts of law, and to correct the alleged erroneous decisions of such courts by setting aside the judgment. Nor is it probable that any such assumption would have been tolerated. Judgments of courts of law are to be reviewed according to the course of the common law, unless a statute otherwise provides. Even in matters where the jurisdiction is concurrent, the judgment of a court of law is conclusive upon courts of equity. Courts of equity only interfere with the operation of judgments of courts of law, upon the allegation that the judgment was obtained by fraud, or upon the ground that some fact has arisen, or been discovered, *since the trial at law*, which renders it inequitable to enforce the judgment at law; or upon the ground of equitable rights which were not cognizable in a court of law. And in those cases the court of equity does not attempt to declare the judgment of a court of law to be void, or to set it aside, but acts upon the party through the process of injunction. (*Story's Eq. Jur.* §§ 1570 to 1575, *inclusive.*)

But there is another, and a broader view of the case, which we think fatal to the action attempted to be instituted by the plaintiffs. Their argument, to show that they have any cause of action is, of course, the possible contingency that they may be, at some future time, subjected to loss and damage, by reason of the apprehended illegal proceedings of the commissioners, which, it is argued, will perhaps, at some future day, increase the taxation of the

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town in order to pay the expense of defending actions to be brought on the illegal bonds. It is not claimed that the plaintiffs have any interest except such as is common to all the tax-payers of the town of Milo. The alleged grievance is that certain apprehended illegal acts will probably result in increasing the taxation of the town at some time hereafter.

Now the general rule is, that for wrongs against the public, whether actually committed or only apprehended, no private action can be maintained. This principle is illustrated by the case of common or public nuisances, which are not actionable by a private person unless some particular damage has resulted to him, which is special to himself, beyond that which is sustained by the community at large. For, as *Blackstone* says, "it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow citizens." And as this sort of injury, when actually committed, affords no ground of action to an individual, so neither can he maintain an action to restrain its commission when only threatened. This principle, as applied to tax-payers and residents of municipal communities, seeking to set aside, or prevent acts which have resulted, or may result, in the waste of the property of, or the increase of taxation upon, the community, has been declared and adopted by the court of last resort in this State. In *Ketchum v. The City of Buffalo*, (14 N. Y. 356,) Justice Wright delivering one of the opinions, to some extent developed these views, and said that the idea that a private action might be maintained for a public wrong was "certainly novel." But as the judgment in that case was affirmed on the merits, and the other members of the court expressed no opinion on the question of the right of the plaintiffs, as tax-payers, to maintain the action, the case is not relied on as authority. Afterwards, in the cases of *Doolittle v. The*

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Supervisors of Broome County, (18 N. Y. 155,) and *Roosevelt v. Draper*, (23 id. 318,) the question was very elaborately considered in the opinions of Judge Denio, which were adopted by the court, and in which the several cases in this State which had given countenance to the doctrine that such actions might be maintained were, so far forth, disapproved and overruled. In the first of these cases, Judge Denio states that the question is one of considerable practical importance, which, if it was then doubtful, "ought to be definitely settled;" and from an examination of those cases it will appear, as we think, that they were intended by the court of last resort, deliberately, fully and definitively to declare that the interests of one or more individuals as residents and tax-payers, in and of a municipal community, whether city, county or town do not authorize the maintainance of an action to set aside or prevent illegal acts, which may result in increased taxation, or other burdens and inconveniences, to which all members of the community are alike subject, and that an act likely to produce taxation is not a matter of private or individual concern.

The principles enunciated in the cases cited, appear to us to govern this case, and to show clearly that the complaint before us contains no cause of action, and therefore that the injunction ought not to have been continued.

A portion of the opinion in *Doolittle v. The Supervisors of Broome County* is as follows: "Where a person wrongfully assumes, under color of an election or appointment, to hold a public office, which, if the pretensions are well founded, would enable him to do acts affecting the persons or property of his fellow citizens, every one, and especially those who would be the subjects of his jurisdiction, has an interest of a certain kind, in divesting him of his assumed authority, and yet nothing is more clear than that a private action for that purpose would not lie." (18 N. Y. 159.) The passage quoted, in principle, describes this

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case. We are asked, at the suit of the plaintiffs, to declare the appointment of these commissioners void; that their assumption of the office is wrongful, and, as a measure of relief, to enjoin and restrain them from performing the duties of the office, to which, as is claimed, they have been illegally appointed. This cannot, as we understand the law, be done at the suit of private persons. It does not alter the question that the suit purports to be commenced in behalf of the plaintiffs, and all other persons standing in a like situation who may desire to avail themselves of it. The complaints in *Ketchum v. The City of Buffalo*, and in *Doolittle v. The Supervisors of Broome County*, were of the same character.

No matter how many persons may join, they still act in their capacity as private persons and individual members of the community. There is much less of apparent hardship in the application of these principles to cases like the present, than in those in which they were applied by the Court of Appeals in the cases cited, and in others which may readily be imagined. The proceedings under the bonding act, have always been reviewed on certiorari, and all objections affecting the legality of the proceedings, or the jurisdiction of the county judge, are available on such review. Express authority for such review is given by the act of 1871. It is declared by section 4 of the act, (*ch. 925, Laws of 1871*), as follows: "Review of proceedings under the acts hereby amended shall be by certiorari." This of itself, perhaps, excludes a review in any other manner; but upon that point we express no definite opinion.

We are not unaware that the courts of some of the other States, and perhaps of the United States, have expressed opinions at variance with those which have been adopted by the Court of Appeals, in the cases referred to. We consider the rule laid down in the latter cases to be the most sound and wholesome, and most in accordance with public convenience and the principles of enlightened juris-

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prudence; but whether we acquiesce in the propriety of the rule or not, our duty is to follow the decision of the court of last resort in the State, deliberately made and not hitherto overruled in that court.

What effect the objections to the validity of the appointment of the commissioners might have upon a *quo warranto*, or how far we might review the proceedings before the county judge, if an application were made to us to compel the issue of the bonds, under the 5th section of the act of 1871, we have not considered, and must be regarded as expressing no opinion upon the question of whether the commissioners were rightfully appointed; since the question does not arise; as we hold that the complaint contains no cause of action, assuming all the plaintiff claims on the subject to be correct.

The order continuing the injunction is reversed, with \$10 costs of the appeal.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Johnson, Talcott and Barker, Justices.]

FANNY M. CANFIELD vs. WALTER FAIRBANKS.

63b 461
188d 31

In a suit in equity, brought by one of the heirs of a grantor, against another, to set aside a deed executed to the defendant, and to have the plaintiff declared entitled to the undivided half of the premises conveyed, as one of the heirs of the grantor, on the ground that the grantor was induced to execute such deed by false and fraudulent representations, and by undue and improper influence, and that the grantor was of unsound mind, evidence is admissible, on the part of the defendant, tending to show that from the time he became of age he had, at the request of his father, (the grantor) remained upon the farm embraced in the deed, and devoted his time and labor to the same, for sixteen years, without compensation, upon the promise and agreement of the grantor that he should, in consideration thereof, have the farm, in the end, and that he (the grantor) would either deed or will it to him.

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Such evidence is admissible on several grounds: 1. As tending to show a defense to the action. 2. Upon the question of the validity of the deed, as against the allegation of undue influence. 3. As a circumstance touching the question of the grantor's sanity or insanity; and to show the reasonableness and propriety of the deed, and that its execution was a sane and just act, and evinced the exercise of reason and judgment.

Where the defendant, in such an action has no remedy at law, to get compensation for the labor of years, except through the contract he offers to prove; and where, if such a contract existed, he was induced thereby to remain with his father, and labor for his benefit, for several years, relying upon his promise that he should ultimately, either by deed or will, have the farm upon which his labor was thus bestowed, then the case presents the precise circumstances under which the court will refuse to interfere to set aside the conveyance; because it cannot exercise its jurisdiction by so doing, and at the same time do justice to the defendant.

A court of equity, when its jurisdiction is invoked to set aside deeds and contracts of a person upon the ground of insanity, acts upon equitable principles. It is by no means a matter of course for a court of equity to set aside and declare void the act of a lunatic executed during his lunacy. It does so in no case, except upon equitable terms—upon the universal maxim of that court, that he who seeks equity must do equity.

A PPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

C. C. Torrance, for the appellant.

S. S. Spring, for the respondent.

By the Court, TALCOTT, J. The plaintiff and the defendant are the only children and heirs at law of Samuel Fairbanks, who died intestate, in July, 1871. The intestate was, for many years, the owner of, and resided upon, a farm of 76 acres in the town of Ashford, in Cattaraugus county, alleged in the complaint to have been worth nearly \$4000, at the time of the conveyance hereinafter mentioned, and which was the only real property he owned. On the 12th day of June, 1871, the intestate conveyed these premises to the defendant, his son, who, at the same time, executed back to the intestate a lease of the

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same premises for the natural life of the intestate, reserving no rent. The intestate died on the 15th day of July, in the same year.

This action is brought to set aside the conveyance, and to have the plaintiff declared entitled to the undivided half of the premises, as one of the heirs at law. The grounds set up in the complaint, on which it is sought to set aside the conveyance, are, "that the intestate was induced to execute the same by reason of false and fraudulent representations"—no representation, however, being specified—and "by undue and improper influences," which are also neither described or indicated; and that the grantor was not of sound mind and memory at the time of the execution of the conveyance, but was "wholly devoid of all mental capacity whatever."

No evidence was given of any representations, and no affirmative evidence of any undue influence, beyond proving the relations of the parties, and the fact that they went together to a lawyer, when the two instruments were drawn, and that the son explained to the attorney what they wanted to accomplish, and took the principal part in the conversation, as to the mode in which it should be done. The referee has found, that at the time of the execution and delivery of the deed, the deceased was not of sound mind, and was incompetent to transact the business in question, by reason of the unsound and disordered condition of his mind; and has declared the deed to be void, and ordered a judgment that it be cancelled of record, and that the plaintiff recover possession of the undivided half of the premises.

The evidence touching the alleged insanity of the deceased, tended to show that being a man of about sixty years of age, and in a bad state of health, he had fallen "into a melancholy frame of mind during the last two or three years of his life, expressed apprehensions of coming to want, and became less social and more taciturn than

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had been his former habit." Taking the whole testimony together, as stated in the case, it is far from being entirely satisfactory to establish that degree of insanity or mental incapacity the existence of which is necessary to avoid a deed or will. (*See Jackson v. King*, 4 Cowen, 207; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoemaker*, 24 *id.* 85; *Stewart v. Lisenard*, 26 Wend. 255.)

There was, however, evidence on the subject, and as the judgment must be set aside upon other grounds, we will not discuss the question whether the report is so far against the weight of the evidence that it should be set aside. Various objections appear to have been taken by the defendant to the admission of questions on the part of the plaintiff, and the exclusion of questions on the part of the defendant, designed to elicit the opinions of witnesses as to the sanity of the deceased, and the impressions on their minds which his conduct had produced. These it is not necessary to discuss here, as by the argument the attention of the counsel has been called to the rules which have been established by the courts on this subject, and on another trial they will probably seek to keep within the rules, as thus laid down.

It appeared that the plaintiff was married about eighteen years before the death of the father, and went at that time away, and continued to reside with her husband, afterwards, and that the defendant, from about the time he became of age, had labored for his father, the deceased, upon the farm in question, without wages or other compensation, except, perhaps, his support, devoting his entire labor to the carrying on and cultivation of the farm; and he offered to prove that his father had induced him to remain, and devote his time and labor to the farm for sixteen years, by promising him, at different times, that he should have the farm in the end, and that he (the father) would either deed or will it to him, in the end.

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This evidence was objected to, 1. As not admissible under the pleadings. 2. That the agreement was void. 3. That the proof was immaterial. We think this evidence was admissible, on several grounds. It was admissible as tending to show a defense to the action. This is an action in equity, in which the extraordinary, and, to a certain extent, discretionary jurisdiction of the court is invoked to set aside a deed. A court of equity, when its jurisdiction is invoked to set aside deeds and contracts of a person, upon the ground of insanity, acts upon equitable principles. It is by no means a matter of course for a court of equity to set aside and declare void the act of a lunatic executed during his lunacy. It does so in no case, except upon equitable terms—upon the universal maxim of that court that he who seeks equity must do equity. As, for instance, where conveyances have been obtained from the lunatic at a great under value, with reason to believe actual fraud on the part of the grantee; yet the amount actually paid must be refunded as a condition of relief. (*Addison v. Dawson*, 2 *Vernon*, 678. *Person v. Warren*, 14 *Barb.* 488. *Price v. Berrington*, 9 *Hare*, 404.)

"The court of chancery," says Mr. Shelford, "will not, as a matter of course, interfere to set aside contracts entered into and completed by a lunatic, even though they be void at law, but the interference of the court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favor of the lunatic, so as to do justice to the other party, the court will leave the lunatic to his remedy, if any, at law." (*Shelford on Lunacy*, 419. See also *Story's Eq. Jur.* 228; *Niell v. Morley*, 9 *Ves. Jr.* 478; *Loomis v. Spencer*, 2 *Paige*, 153; *Sprague v. Duel*, 11 *id.* 480.)

In this case the defendant has no remedy at law to get compensation for the labor of the best part of his lifetime, except through the contract he offered to prove, and if such

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a contract existed, and it is true that he was induced thereby to remain with his father and labor for those many years for the benefit of the father, relying upon his promise that he should ultimately, either by deed or will, have the farm upon which his labor was thus bestowed, then the case presents the precise circumstances under which, as Mr. Shelford states the rule, the court will refuse to interfere, because it cannot exercise its jurisdiction to set aside the deed and at the same time do justice to the defendant. The fact that the contract was by parol, and void at law, as was objected by the plaintiff, furnishes one of the chief grounds why a court of equity will not interfere to set aside the act by which the alleged lunatic performed it. Indeed a court of equity will decree specific performance against a lunatic of a contract made by him when sane, when the legal estate can be reached. (*Hall v. Warren*, 9 Ves. 605. *Regge v. Skymar*, 1 Cox, 23. *Owen v. Davies*, 1 Ves. Sr. 82.) The right of the plaintiff to set aside the deed is no greater than would be that of the alleged lunatic himself, or his committee, and an examination of the principles upon which courts of equity act in such cases, makes it quite clear that, if a person when sane should enter into a contract for the conveyance of land, which contract was void at law, and the vendee should, under the contract, render all the consideration; and the vendor should convey the land in pursuance of the terms of the contract; a court of equity would not set aside the conveyance on the ground that at the time it was made, the grantor had become a lunatic, where the vendee could not be placed in *statu quo*. The defense was, in substance, stated in the answer. It was there alleged, in substance, that the defendant had worked for the father upon the farm, as stated, and that the deed was executed in consideration of a contract in substance like that offered to be proved.

But the evidence was furthermore admissible on the

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question of the validity of the deed, as against the allegation of undue influence. Where such relations exist between the parties as in this case, and where the beneficiary has occupied such a position that the grantor has been to some extent under his influence, and perhaps to a certain extent under his control, the law raises a kind of presumption of undue influence, so that when the deed is sought to be set aside upon the ground of undue influence, the grantee always may, and often is, imperatively called upon to produce evidence tending, affirmatively, to show the consideration upon which the deed was executed, and fully explain the reasons and circumstances under the influence of which the deed was made. (*Story's Eq. Jur.* 311. *Sears v. Shafer*, 2 *Seld.* 268. *Jones v. Jones*, *MSS.* 4th department November term, 1871.)

We think the evidence was also admissible, as a circumstance touching the question of insanity, which was one of the grounds upon which it was expressly offered. In the language of the offer, "to show the reasonableness and propriety of the deed, and that its execution was a sane and just act and evinced the exercise of reason and judgment." Although the reasonableness or unreasonableness of the act challenged, is not at all conclusive on the question of the sanity or insanity of the action at the time it was done, yet the circumstances under which the act was done, and the reasons which might have operated to produce it, are not to be wholly excluded from consideration as having no bearing upon the question. (*Patterson v. Patterson*, 6 *Serg. & Rawle*, 55. *Clark v. Fisher*, 1 *Paige*, 171. *Allen v. The Public Adm'r*, 1 *Bradf.* 378. *Gombault v. The Same*, 4 *id.* 226.)

The judgment is reversed, a new trial ordered, costs to abide the event, and the order of reference vacated.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872. *Johnson, Barker and Tulcott*, Justices.]

WALTER GRAHAM, plaintiff in error, vs. THE PEOPLE,
defendants in error.

Upon a writ of error to review a conviction for murder, had in a court of oyer and terminer, it is not sufficient that the records of the court below show a conviction and sentence. It must be made expressly to appear, by a distinct statement in the record sent up as a part of the return, that the prisoner was asked, after his conviction, what he had to say why judgment should not be pronounced against him. The omission of such a statement is fatal to the judgment.

Where a court of oyer and terminer, in its return to a writ of *certiorari*, adhered to the return made by it to a writ of error, as containing the only authentic record of its judgment, in the premises, and declined in any way to alter and amend its minutes without the direction, order or permission of this court, (although they were erroneous,) for the reason that "the record of judgment" was before this court by the return to the writ of error; *Held* that in taking this position the court of oyer and terminer had mistaken the law and practice; inasmuch as, in modern times, the *very record* itself is not sent up, on a writ of error, but only a transcript, and for the purposes of an *amendment*, the record remains in the court below.

The motion to amend a record of a court of oyer and terminer, after a return has been made to a writ of error, should not be made in the Supreme Court. If improper matter has been interpolated in the minutes constituting a part of the return, without the authority of the court of oyer and terminer, and which is no part of its record, that court should direct such matter to be expunged from its minutes.

Where the returns made to a writ of error, and to a *certiorari*, differed in an essential particular, viz., as to the fact whether the prisoner was asked if he had anything to say why sentence should not be pronounced; the former omitting to show that the prisoner was given an opportunity to show any cause, and the latter stating that he was asked that question, and in response thereto made some remarks; it was *held* that the return to the writ of error, being signed by the presiding judge of the oyer and terminer, and by the district attorney, and bearing upon its face the evidence that it had been inspected by the court, while the return to the *certiorari* was not so signed, the return to the writ of error was to be regarded as containing the authentic judgment of the court below, and upon which this court was to proceed and render judgment.

Where the return shows that a part of the minutes, embraced therein, is not the record of the court below, but is in legal effect a forgery, and should have been expunged, by the court below from its minutes, the effect of the return, taken altogether, must be to produce the same result, in this court, as though the interpolated matter had been expunged.

Upon the reversal of a judgment of a court of oyer and terminer, on the

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ground that it does not appear, from the return to the writ of error, that the prisoner was asked if he had anything to say why sentence should not be pronounced, the case is not to be remitted to the court below for sentence, nor is the prisoner to be absolutely discharged; but this court will proceed to examine the errors alleged to have been committed on the trial, and if it is of opinion that the court of oyer and terminer erred in admitting improper testimony against the prisoner, will grant a new trial.

On a trial for murder, an attorney employed by the prisoner on the day of the alleged murder, to draw for him certain papers, viz., a lease and receipt, cannot be compelled to testify to the drawing of such papers by him, or to the contents thereof; nor as to the state of either of the papers, when delivered to the prisoner; where such papers are not in any manner necessarily connected with the perpetration of any crime, and they cannot, of themselves, in any way aid in the commission of any fraud or crime.

WRIT of error to the court of oyer and terminer of Wayne county.

D. L. Stow and J. D. Husbands, for the plaintiff in error.

C. H. Roys, (district attorney,) and *Geo. F. Danforth*, for the defendants in error.

By the Court, TALCOTT, J. The plaintiff in error was, in October, 1870, in the oyer and terminer of Wayne county, convicted of the willful murder of one Samuel Olts, alleged to have been committed in January, 1870, and sentenced by the court to be hanged, on the 14th day of January, 1871. He sued out a writ of error, commanding the court of oyer and terminer to return the record and proceedings into this court. And thereupon an order staying proceedings on the judgment was made by the justice of the Supreme Court, who presided on the trial. The clerk of Wayne county returned to the said writ of error, the indictment, the bill of exceptions taken by the prisoner on the trial, and what purports to be a copy of the minutes of the court of oyer and terminer, purporting to have been made and taken in that court on the 24th day of October, 1870. This paper recites that the prisoner

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having been duly indicted, &c., and having been arraigned and tried by a jury, and convicted upon the indictment for the said offence of murder in the first degree, then proceeds to state as follows: "He is sentenced by the said court now here to be returned to the common jail of Wayne county, there to be kept till the 21st day of December, 1870, on which day, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day, he shall be carried by the sheriff of Wayne county to the place of execution," &c.

This paper purports to have been signed by the then district attorney of the county of Wayne, and by the justice of the Supreme Court who presided on the trial, and is indorsed as a "record of conviction," and from a further indorsement thereon appears to have been filed on the 5th day of November, 1870. And this paper is returned to the writ of error, on the 27th day of January, 1871, by the clerk of Wayne county, under his seal of office, as the record of judgment in the case. The indictment, the bill of exceptions, the paper, the contents of which are above stated, and the writ of error, are the only papers copies of which are returned to the writ of error. It will be perceived that the paper returned as the judgment, does not state that the defendant ever pleaded to the indictment, or that, before sentence, he was asked if he had anything to say why the judgment of the court should not be pronounced upon the conviction.

At the September term, 1871, the defendants in error made a motion to dismiss the writ of error, upon the ground that no formal record of conviction appeared; or, in the alternative, that the motion to dismiss should be denied; that a certiorari alleging diminution should be issued. At the following term the motion to dismiss the writ of error was denied, and a writ of certiorari ordered to be issued. On this motion it appeared that no formal record of conviction, according to the common law, had

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ever been filed in the case. It was also further alleged, by the defendants in error, that the paper, so returned as the judgment record, was incorrect, and that in fact the minutes of the court, as existing at the time of the motion, showed that the prisoner, previous to his sentence, was asked the usual question, as to what he had to say why sentence should not be pronounced upon him. On the part of the plaintiff in error, affidavits were produced, on that motion, tending to show that the statement as to the prisoner having been asked what he had to say, &c., was an interpolation and alteration of the records of the court of oyer and terminer, made without the order or authority of the court, and long after its adjournment, and after, not only the issuing, but the return to the writ of error. On the argument of the motion, it was suggested to the counsel for the plaintiff in error, that if such was the fact, the remedy was by an application to the court of oyer and terminer, and in the order made by this court directing the certiorari, leave was given to the parties to move in the oyer and terminer for such relief as either might be deemed entitled to. The writ of certiorari is now returned to this court. The return consists of a statement, on the part of the court of oyer and terminer, setting forth that, "on searching the records of said court, it finds that at a court of oyer and terminer, held at the village of Lyons, in and for the county of Wayne, on the 24th day of October, 1870: present, Hon. C. C. Dwight, justice, L. M. Norton, county judge, C. C. Teall, justice of sessions, J. L. Hedden, justice of sessions.

The People *vs.* Walter Graham. Indictment for murder, 1st degree.

The said Walter Graham having been heretofore duly indicted for having, on the 14th day of January, 1870, committed the crime of murder in the first degree, and having been duly brought into court and tried by a jury at the present term of this court, he was found guilty by said

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jury on the 27th day of October, 1870, of the crime charged against him in said indictment. On motion of J. H. Camp, district attorney, prisoner Walter Graham brought into court and sentence moved. Whereupon the prisoner, Walter Graham, was ordered to stand up, and the court asked the said Walter Graham if he had anything to say why the sentence of the law should not be pronounced against him, and thereupon the prisoner made some remarks. Whereupon the court now here sentence the said Walter Graham to be returned to the county jail, of the county of Wayne, until the 21st day of December, 1870, at which time he shall be taken from said jail to the place of execution, and between the hours of ten in the forenoon and four o'clock in the afternoon, be hanged by the neck until he is dead. And this we do certify to the justices of the Supreme Court, as we are within commanded."

The return then proceeds to set forth an order made by the court of oyer and terminer, held in and for the county of Wayne, on the 22d day of April, 1872. The order recites that a motion having been made at the (then) present term of said court by the above named Walter Graham, to strike out and expunge that portion of the records and minutes of the clerk of Wayne county, which states that Graham was asked why sentence should not be pronounced, &c., orders "that said motion be denied, upon the ground that the record of judgment in this case now being in the Supreme Court, before the general term thereof, by the return of the clerk of this court to the writ of error herein, and no order having been made by said general term, remitting the said judgment record to this court for amendment, and a writ of certiorari having been issued to this court, by an order of the last general term of the Supreme Court, to certify to the Supreme Court, at the next general term thereof, the records and proceedings of this court when pronouncing sentence upon said Graham, this court deems it improper to alter, modify or amend, the

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records and proceedings, entries and orders, before return made to said writ of certiorari, without the direction, order or permission of the said general term; but this court nevertheless finds and certifies to the said general term, that that portion of the records and clerk's minutes asked to be stricken out, is true, and recites correctly the proceedings it describes; that the prisoner, said Walter Graham, was asked, after his conviction at a term of this court in October, 1870, and before sentence was passed upon him, what he had to say why sentence should not be pronounced upon him; and that the portion of the minutes of the said clerk which states that the prisoner was asked such question, was added to and written in the said minutes and records, after the term at which said Graham was convicted had adjourned, and within two weeks prior to the 5th day of May, 1871. And it is further ordered that the return of this court to the said writ of certiorari, contain and include the notice of motion made at the present term of this court, and the affidavit in support thereof, together with the affidavits and papers read in opposition thereto, and this order made thereon."

This is certainly an extraordinary return to a writ of certiorari, which only required the court of oyer and terminer to return the record and proceedings of the said court of oyer and terminer when pronouncing sentence upon the said Walter Graham, at the October term of the said court, in the year 1870. It purports, in the first instance, to return the minutes of the court made and entered on the 24th day of October 1870.

These minutes state that the prisoner was found guilty on the 27th day of October, 1870, and proceed to state that the court "now here" (viz., on the 24th day of October, 1870) sentence the prisoner to be hanged. It appears also from the bill of exceptions signed and sealed by the judges of the oyer and terminer that the prisoner was convicted on the 27th day of October, 1870. So that, so far

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as these minutes are to be relied on, they show that the prisoner was sentenced before conviction. There is probably some error in this matter, which should have been corrected in the court of oyer and terminer. It is a singular fact, that what was returned to the writ of error as the record of judgment, purports to be the minutes of the proceedings of the oyer and terminer on the 14th day of October. It is not however necessary to consider, in this case, what effect these statements of dates in the various papers before us might have in a case where the question turned upon this point. In the case of *Weed v. The People*, (31 N. Y. 465,) the judgment was reversed for what was undoubtedly a mere clerical error in the record of the court below, the singular instead of the plural number being used, whereby it was made to appear that the trial, conviction and sentence, took place before one only of the judges of the oyer and terminer. It will be perceived that the court of oyer and terminer, by its return to the writ of certiorari, seems to abide by the return made to the writ of error, as containing the only authentic record of its judgment in the premises, and declines in any way to alter and amend its minutes, without the direction, order or permission of this court, because "the record of judgment" is before this court by the return to the writ of error. We apprehend that in this position the court of oyer and terminer has mistaken the law and the practice. In modern times the *very record* itself is not sent up on a writ of error, but only a transcript, and for the purposes of an amendment, the record remains in the court below. (*Rew v. Barker*, 2 Cowen, 408. *Luysten v. Sniffen*, 1 Barb. 428.) Though there are authorities which hold that in civil actions the record of the court below may be amended in the court of review. (*Pease v. Morgan*, 7 John. 467.) When the court below amends its record, the transcript thereof may be amended on motion, in this court. (*Rew v. Barker*, 2 Cowen, 408.)

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The court of oyer and terminer, in this case, seems to have been under the impression that the motion to amend its record, after a return to a writ of error, should be made in this court. This we conceive to be an erroneous view of the law. Independent of the inherent impropriety of an attempt by one court to amend the record of another, the Revised Statutes require the court of review, in criminal cases, to proceed and render judgment on the record before them. (2 R. S. 741, §§ 20, 23.)

It was held in the third district, that this provision had even the effect to abrogate the certiorari, alleging diminution in criminal cases. (*People v. McCann*, 3 Parker, 272.) But this decision was afterwards overruled in the same district, (*O'Leary v. The People*, 17 How. 316,) and it is now settled by the court of last resort, that such a writ may still issue. (*Cancemi v. The People*, 18 N. Y. 128. S. C., 16 id. 501.)

In this case the motion was not to amend the records of the court, but to expunge therefrom matter which had been inserted without its authority, and which was no part of its record. What are the common law powers of the court, as to amendments in criminal cases, and whether the statute of *jeofails* applies to such cases, it is unnecessary to consider. There can, we think, be no doubt but what the court of oyer and terminer should have expunged from its minutes the matter which had been interpolated without its authority, and thus have prevented the possibility of the interpolated matter being returned to this court as a part of its record.

Proceeding, however, to consider the case on the record before us, we find that by the return to the writ of error and the certiorari, we have presented to us two documents purporting to be the minutes of the proceedings of the court of oyer and terminer of Wayne county, on the 24th day of October, 1870. They differ in regard to the essential matter whether the prisoner was asked if he had any-

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thing to say why sentence should not be pronounced. That which was returned to the writ of error, and which the court below insists upon as the record of its judgment, wholly omits to show that the prisoner was given an opportunity to show any cause; in which case the Court of Appeals has held that the judgment is void; whereas the minutes returned to the certiorari, state that the prisoner was asked that question, and in response thereto made some remarks. No motion appears to have been made in the court below to correct those minutes, which were returned upon the writ of error. Upon which of these two documents are we to proceed and render judgment? Which is to be regarded as the authentic judgment of the court below? The record returned to the writ of error, is signed by the presiding judge of the court, and by the district attorney.

The revised statutes (2 R. S. 738, § 5) provide that "whenever any judgment upon any conviction shall be rendered in any court, it shall be the duty of the clerk thereof to enter such judgment fully in his minutes, stating briefly the offence for which such conviction shall have been had, and the court shall inspect such minutes, and conform them to the facts."

The statutes further provide, in the next section, (§ 6:) "It shall be the duty of the district attorney, upon being required by the clerk, to prepare for him a statement of the offence of which any person shall be convicted, as the same is charged in the indictment to be entered in the minutes of such clerk; but the court shall inspect the same, and conform it to the indictment." A following section (§ 10) enacts as follows: "A copy of the minutes of any conviction, with the sentence of the court thereon, entered by the clerk of any court, duly certified by the clerk in whose custody such minutes shall be, under his official seal, together with a copy of the indictment on which such conviction shall have been had, certified in the

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same manner, shall be evidence in all courts and places of such conviction, in all cases in which it shall appear, by the certificate of the clerk or otherwise, that no record of judgment on such conviction has been signed and filed." The entry returned to the writ of error is signed by the presiding judge, and by the district attorney. It is plain that the entries which are declared to be evidence in all courts and places, are those entries inspected by the court under sections 5 and 6, above referred to; and while there is no provision requiring the entry prepared by the district attorney or by the clerk, and inspected by the court, to be signed by either the district attorney or a judge of the court, yet the entry returned to the writ of error is so signed, while that returned to the certiorari is not. On the motion to dismiss the writ of error in this case, because no judgment record was made up, we held that the statute before referred to, making the certified copy of the minutes of conviction, the sentence of the court and a certified copy of the indictment, evidence of the conviction in all courts and places, in conjunction with another section of the Revised Statutes, which provides that, upon a writ of error being filed, which shall operate as a stay of proceedings, it shall be the duty of the clerk of the court to make a return thereto, containing a transcript of the indictment, bill of exceptions and judgment of the court, (3 R. S. 1034, § 22, 5th ed.,) authorized the court of review to proceed to review and reverse or affirm the judgment of the court below, when no formal, common law record of judgment had been made up and filed or signed. (*See opinion of Mullin, J., in this case, on the motion to dismiss the writ of error.*) The judgment of the court, which is to be returned when no formal record of judgment has been filed, is undoubtedly the judgment entered in the minutes, and duly inspected by the court.

The minutes returned upon the writ of error, upon their face bear the evidence that they have been inspected by

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the court, whereas the order made by the court below, on the motion to expunge, and by the direction of that court made a part of its return to the writ of certiorari, shows that the minutes, as returned upon that writ, have not been inspected or sanctioned by the court.

Moreover, the minutes, as returned to the certiorari, are directly impeached, and so far as relates to the question of the prisoner having been asked if he had anything to say, &c., are overthrown by the return, in which the court below informs us that so much of the entry is not a part of its record, but was interpolated in its absence and without its order. Even under the Statute of *jeofails* such an alteration of the records of the court is wholly unauthorized and void. That statute, from abundant caution, expressly provides that "no process, pleading or record, shall be amended or impaired by the clerk or other officer of any court, or by any other person, without the order of such court, or some other court of competent authority." (2 R. S. 425, § 9.) The return of the court below, therefore, shows to us that such part of the minutes is not their record, but is in legal effect a forgery; and while we think that court should have expunged the interpolated matter from its minutes, yet we think the effect of the return, taken altogether, must produce the same result in this court as though the interpolated statement had been expunged; and so regarding it, we must hold that the records of the court below do not show that the prisoner was asked what he had to say why judgment should not be pronounced against him. This is fatal to the judgment, as has been recently determined by the Court of Appeals. (*Messner v. The People*, 45 N. Y. 1.) According to that decision it is not sufficient that the records of the court show a conviction and sentence. It is not to be presumed from these, that the practice of asking the prisoner, before sentence, what he had to say, &c., has been complied with, but it is necessary that a compliance with this prerequisite

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to the validity of the sentence should be made expressly to appear, on a writ of error, by a distinct statement in the record of the court below.

There is another peculiarity in this case, to which it is proper to allude. The order made by the court of oyer and terminer on the motion to expunge, and which, by its direction is made a part of the return to the certiorari, contains the following: "But this court, nevertheless, finds and certifies to the said general term, that that portion of the records and clerk's minutes asked to be stricken out on this motion is true." This does not seem to us to vary the case. The writ of certiorari issued out of this court did not call upon the court of oyer and terminer to make a return stating whether, as a matter of fact *dehors* the record, Graham had been asked the question referred to, but to return "the record of the proceedings of said court of oyer and terminer, when pronouncing sentence upon the said Walter Graham at the October term of said court, in the year 1870, and especially the *record*, if any, of the request of said court to said Graham to say what he might have to say, why sentence should not be pronounced upon him." The court below neither assumes to amend its record, nor to adopt the unauthorized interpolation, but returns to this court that certain facts exist, which, if amendments can be made in criminal cases, might justify it in ordering an amendment. We can pay no attention to the statement. It was held, in *Stephens v. The People*, (19 N. Y. 549,) that "a material omission in a record cannot be cured by a separate certificate. The only remedy in such case is by amendment, which can only be made by order of the court." It is further to be observed that the two records which have been returned to us are deficient in other particulars. They fail to show any legal trial or conviction. The record returned to the writ of error fails to show any plea of the defendant, or entered for him by order of the court, and the second record re-

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turned fails to show that the prisoner was ever arraigned upon the indictment, or ever was called upon to, or did plead to the same. The bill of exceptions contains a statement that the prisoner was arraigned and pleaded, but that is no part of the record of judgment. As no observations were made by the counsel on this defect, we will not discuss the consequences of it, since it cannot change the result at which we have arrived.

The foregoing statement of facts, and our conclusions, lead to the conclusion that, in conformity with the decision of the Court of Appeals, the judgment must be reversed, because it does not appear that the defendant was asked if he had anything to say why sentence should not pronounced.

What is the consequence of a simple reversal of the judgment in such a case, upon such a ground? Does the verdict stand, and is the case to be remitted to the court below for sentence, or is the prisoner to be absolutely discharged? This question was somewhat mooted in the case of *Messner v. The People*, but there, as in the case at bar, another feature was presented. In that case, as in this, the plaintiff in error presented a bill of exceptions, claiming that errors had been committed on the trial which entitled him to a new trial, and the Court of Appeals having found such error, a new trial was ordered, and Messner was subsequently re-tried, convicted and executed. As was done therefore in that case, we proceed to examine the errors alleged to have occurred on the trial and to appear in the bill of exceptions. And we are of opinion that the court of oyer and terminer committed a manifest error against the prisoner, in the admission of testimony against him. It appeared that no one, except the prisoner and the deceased, were present when the homicide was committed. The prisoner had admitted that he killed the deceased, but alleged that such killing

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was in self defense. It appeared that the homicide was committed, at some time in the afternoon or evening of the 14th of January, 1870. The prosecution called as a witness Columbus J. Viele, a lawyer, having an office and practicing as an attorney at law, at the village of Wolcott, which was near the scene of the homicide; and sought to prove by his oral testimony that the prisoner, on the afternoon of the said 14th day of January, had applied to him to draw, and in pursuance of such employment he had drawn, a certain lease of a farm from the deceased to the prisoner, for the period of five years, and also a certain receipt, as follows: "Received of Walter Graham four hundred and twenty-six dollars in full of all demands, on a note given by Alexander Graham to me.

Dated Tuesday, January 14, 1870."

It clearly appeared, by the preliminary cross-examination of the witness, that he was retained and employed by the prisoner in his capacity as an attorney, to draw these papers, and thereupon the counsel for the prisoner objected to his being examined on the subject referred to, the objection being renewed to every material statement of the witness concerning the alleged interview, and what transpired thereat. All such objections were overruled, and to the various rulings the defendant excepted. The lease was not produced, but it was admitted that notice had been given to the prisoner to produce the same, and the witness was permitted, against the objection of the prisoner, to state, so far as he could recollect, the contents thereof. The receipt had been found in the pocket book of the prisoner, and was produced, and purported to have been signed by Samuel Olts, the deceased, and one Maria Graham. The witness was asked, on the part of the people, "At the time you gave it to Graham, was all the writing that is on that paper now, on it?" to which he answered, "No, sir." He was then asked, "What portion that was not on it at that time, is on it now?" This ques-

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tion was objected to, on the part of the defendant, upon the ground that the communication between the prisoner and the witness was privileged. The objection was overruled, and the prisoner excepted. The witness thereupon stated that the signatures were not upon the paper when he delivered it to the prisoner.

Evidence was also given that the prisoner, after the homicide, claimed to have such a lease from the deceased as the attorney described, and evidence was also given of the existence of such a note as was described in the receipt made by Alexander Graham to the deceased, for the benefit and accommodation of the prisoner; and the evidence tended to establish the probability that the prisoner did not pay the note at the time specified in the receipt, or at any other time, but that the same was afterwards paid and taken up by his brother, the maker of the note. Facts were also given in evidence, on the part of the people, to show the impossibility that the deceased had ever made or agreed to make the lease which the prisoner had employed the attorney to draw. No direct evidence was given as to the genuineness of the signatures purporting to be signed to the receipt. The precise theory as to its pertinency, upon which all this evidence was offered and admitted, though somewhat obscure, seems to have been this, namely: That the prisoner procured the lease and receipt to be drawn, having it in contemplation to forge the signature of the deceased to the lease and receipt, and to murder the deceased, in order that the forgery might be undetected, and the lease and receipt be set up as valid and genuine instruments. This evidence was apparently offered to refute the claim of the prisoner that the homicide was the result of a sudden attack upon him by the deceased, and was committed *se defendendo*.

The testimony of the attorney, Columbus J. Viele, was wholly inadmissible. It is stated that the evidence was admitted by the oyer and terminer, upon the strength of

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the opinion of Selden, J., in *Whiting v. Burney*, (30 N. Y. 330,) to the effect that professional communications between client and attorney are only privileged when they relate to some suit or judicial proceeding pending or anticipated. But this proposition of Selden, J., in that case, was not assented to by the other members of the court, who concurred in the result upon another ground, as appears from the report of the case, and as is shown in the opinion of Foster, J., in *Brand v. Brand*, (39 How. Pr. R. 260,) and the proposition has been since distinctly overruled. (*Williams v. Fitch*, 18 N. Y. 550. *Britton v. Lorenz*, 45 id. 57.)

The true rule is laid down by *Greenleaf*, as follows: "The rule is clear and well settled, that the confidential counsellor, solicitor or attorney of the party cannot be compelled to disclose papers delivered or communications made to him in that capacity. This protection, says *Lord Ch. Brougham*, 'is not qualified by any reference to proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employments, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment, in his behalf, matters which they know only through their professional relation to their client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers in any court of law or equity, either as a party or as a witness.'" (1 *Greenleaf's Ev.* § 237.) And as particularly applicable to the question put to the attorney as to the state of the receipt when delivered by him to the client, see *Wheatley v. Williams*. (1 M. & W. 533;) *Brown v. Pargon*, (4 N. H. 443;) *Coveney v. Tannahil*, (1 Hill, 33.)

The case is not within the rule that a communication

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made to an attorney to obtain professional advice as to the commission of a felony or other crime *malum in se*, is not privileged. (*Bank of Utica v. Mersereau*, 3 Barb. Ch. 598.)

The advice sought of the attorney, and the instruments procured to be drawn by him, were in themselves wholly irrelevant, and in no manner necessarily connected with the perpetration of any crime; nor could they, of themselves, in any way aid in the commission of any fraud or crime. In fact the assumption that the prisoner has committed or contemplated any crime, in connection with the instruments which he employed Mr. Viele to draw, is merely conjectural, and itself founded upon an inference drawn from the inadmissible testimony of the attorney, to wit, that on a certain day and hour the prisoner applied to him to draw those instruments.

We are, therefore, of the opinion that in the admission of the testimony of Columbus J. Viele, against the objection of the prisoner, the court of oyer and terminer erred; and following the course adopted by the Court of Appeals in *Mesner v. The People*, where the record did not show that the prisoner had been asked what he had to say, &c., and where there was also found error committed against him in the admission of evidence on the trial, we reverse the judgment of the oyer and terminer, and grant to the prisoner a new trial in the case.

Judgment of the oyer and terminer of Wayne county reversed, and new trial ordered in that court.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Johnson, Talcott and Barker, Justices.]

ABRAM LAPHAM, commissioner of highways for the town of Yorkshire, Cattaraugus county, *vs.* ALFRED RICE, commissioner of highways for the town of Sardinia, Erie county.

An action by a town officer of one county, against a town officer of another county, where the plaintiff sues and the defendant is sued in his official capacity, cannot be commenced before a justice of the peace of either county.

Nor can such an action be tried in the circuit court of either county, though originally commenced in the Supreme Court, if the objection be taken at the proper time and in the proper manner.

The only demurrer to a complaint which is allowed in a justice's court, by the present law, is when the complaint is not sufficiently explicit to enable the defendant to understand it, or when it contains no cause of action. Neither of these causes of demurrer applies to an objection, that the action is brought in a wrong county.

Although in a summons, issued by a justice of the peace, in an action by town officers of one county against town officers of another county, the official titles of the respective parties are stated, yet if it be not stated that the plaintiff sues, or the defendant is sued, in his official capacity, the statement of the official titles of the parties operates as a mere *descriptive persona*.

As such, it is mere surplusage, and will not prevent the plaintiff from complaining against the defendant in regard to a mere private matter existing between the two; and unconnected with the official capacity of either. Consequently, a dismissal of the suit before a complaint is put in, showing that the action is connected with the official character of the parties, would be erroneous.

There seems to be no method by which, in a justice's court, the defendant, in a case where the action is commenced in a wrong county, can avail himself of the objection, except as a ground of nonsuit on the trial, as at common law, where the objection is not open to a demurrer. *Per TALCOTT, J.*

On a new trial, the party respondent, on appeal from a justice's court, cannot be confined to the objections he made in the justice's court; those objections not being in any manner made known to the appellate court.

On a new trial in the appellate court, as upon any other new trial, the parties are entitled to take any ground permissible under the pleadings.

In a justice's court, the objection that the action is brought in a wrong county, if well founded, must necessarily defeat the action itself.

APPEAL from a judgment rendered for the plaintiff, at the Cattaraugus circuit, on a trial by the court, without a jury.

Lapham v. Rice.

A. J. Knight, for the appellant.

I. The court had no power to allow an amendment of the complaint by striking out the name of Hudson Waite as co-plaintiff. This amendment was duly excepted to. This court occupied the position of the county court, and the county court can have no greater power to allow such an amendment than had the justice of the peace. Courts of justices of the peace have had no power, before or since the Code, in actions on contracts, to amend the process or pleadings by striking out the name of a party, except in case of a defence operating as a personal discharge, as infancy, lunacy, &c. (*Webster v. Hopkins*, 11 How. Pr. 140. *Hartness v. Thompson*, 5 John. 160. *Hall v. Rochester*, 3 Cowen, 374. *Gates v. Ward*, 17 Barb. 424. *Gilmore v. Jacobs*, 48 id. 336.) The Code provides, in section 8, that the first four titles of the second part (sections 69, 126, inclusive) relate to actions in all the courts in the State, and the other titles to actions in Supreme, county court, &c., expressly omitting justices' courts; also subdivision 15, section 64, of the Code provides, "that the provisions of this act, respecting forms of action, parties to actions, rules of evidence, the times of commencing actions, shall apply to justices' courts." Hence, upon the principle of *expressio est unius exclusio alterius*, neither section 173 nor 274 apply to justices' courts. Nor does that part of section 64, subdivision 15, above referred to, in reference to parties to actions, apply to an amendment by dropping a party, as there is a specific title, to wit, title 3, part 2, in reference to parties to actions, to which that part of subdivision 15, section 64, refers. The case of *Ackley v. Tarbox*, (31 N. Y. 564,) upon which the counsel for the respondent must rely, was an action of tort, in which different rules have always been held in reference to the power of amendment as to the parties in the action, from those in actions on contracts; and though the opinion of Judge Davies, in that case, refers to section 173 of

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the Code, as applicable to actions in justices' courts, yet it was a mere extra *dictum*, and not the point on which the case was decided. That was an action brought by the wife for the conversion of her cow, the husband being joined as a nominal party only, before the practice was settled, no joint cause of action being set up, and the decision was simply that the husband being a nominal party only, and his name producing no embarrassment to the defendants, the wife could recover alone. On the contrary, the present action is based on a contract liability to the plaintiffs jointly, and issue taken thereon. Subdivision 5, section 366 of the Code, refers to amendments in reference to the cause of action, not in reference to the parties. Before the amendment in 1865, to said subdivision 5, section 366, it was held that the county court, on a new trial, had not the power to amend the pleadings, even in cases where the justice of the peace could grant the amendment when the case was before him; and this amendment in 1865, was made to give the county court the same power as the justices' court originally had in the same action. (*Savage v. Cook*, 17 *Abb.* 403.) It would be absurd to give the county court, on appeal, the power of amendment which the court in which the action originated never possessed. For the same reasons the court erred in directing judgment in favor of one of the plaintiffs, which was duly excepted to. Dropping a party is not an amendment of the pleadings. (*Billings v. Baker*, 6 *Abb.* 213.)

II. The court erred in refusing the defendant's motion to nonsuit the plaintiff, on the grounds that the plaintiffs should have brought separate actions against the defendant. The misjoinder of the plaintiffs can be taken advantage of on motion for a nonsuit. (2 *Wait's Law and Pr.* 276. *Graham's Pr.* 94, 95, 2d ed. *Dob v. Halsey*, 16 *John.* 33.) Chitty says: If the objection do not appear on the face of the pleading, it would be a ground of nonsuit at the trial. (1 *Chitty*, 76.) That they were improperly

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joined, see *Corey v. Rice*, (4 *Lans.* 142.) The motion for a nonsuit was made before the plaintiff's counsel asked to amend, by dropping one of the plaintiffs, and should have been granted.

III. The court erred in refusing to nonsuit the plaintiffs, on the ground that the evidence did not show a cause of action. 1. There was no joint cause of action established, as the commissioners paid the money from the separate funds of each town. (1 *Chitty's Pl.* 11. *Gould v. Gould*, 8 *Cowen*, 168.) 2. It is submitted that the three towns should equally bear the expense incurred on the bridge. When this cause was submitted before, to the general term, Judge MULLIN expressed the opinion that Sardinia should bear one half the expense; but the decision of the general term was simply that the plaintiffs were improperly joined, and a new trial ordered on that ground alone. (4 *Lans.* 142.) Besides, the learned judge overlooked the amendment to the statute in 1857. The statute, as amended, reads: "Whenever two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of said towns, without the reference to town lines." (*Laws of 1841, ch. 224, § 1, as amended by Laws of 1857, ch. 383.*) This statute makes them jointly liable; hence they would be equally liable unless the words "without reference to town lines," qualifies that liability. These words should not be construed as obliterating the line between Yorkshire and Ashford only, but to the lines between all the towns, if to any. Then the whole territory within the three towns would bear the expense, which is the same as the towns paying equally. The bridge is the joint property of the three towns, no one of them owning any particular part. The words of the statute, "without reference to town lines," should be construed so as to make each town liable, without reference to the amount of the bridge in each town. Hence the finding of said

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court, as a conclusion of law, that Sardinia was bound to pay one half the expense of building the bridge, was erroneous. 3. It should affirmatively have appeared that the defendant had funds in his hands as commissioner, or the contract is not binding upon him in his official capacity, nor upon the town he represents. (*The People v. Adsit*, 2 Hill, 619. *Bartlett v. Crozier*, 17 John. 439. *Barker v. Loomis*, 6 Hill, 463. *Garlinghouse v. Jacob*, 29 N. Y. 297.) 4. It is further submitted that when a joint obligor assumes to pay the debt of his co-obligor, he should pay it all, not simply a part of it. If he could pay one half, he could, with the same reason, pay one twentieth, one thirtieth or one hundredth part of it, and then maintain an action as often as he made each payment. It cannot be said that the plaintiff was liable to the contractor for one third, and that justified his payment of that amount, as the parties were severally liable to the contractor, under the statute, for the whole amount. (*Laws of 1841, ch. 225, § 2. Fish v. Folley*, 6 Hill, 54.) 5. It is further submitted that the plaintiff should have submitted his claim to the town board of the town of Sardinia. (*Brady v. Supervisors of New York*, 10 N. Y. 260. *Martin v. Supervisors of Green Co.*, 29 id. 645. *Bell v. Town of Esopus*, 49 Barb. 506.) Officers of municipal corporations are liable: 1st. For their torts. 2d. Where the statute expressly makes them liable. In other cases the claim is against the corporation they represent. This action is not based on a statute liability to the contractor, but on a liability to a joint debtor, resulting from his payment of the joint debt. In other words, it is a common law, and not a statute liability, if any liability exists. Besides, chapter 639 of the laws of 1857, makes provision that a commissioner of highways may proceed by motion at a special term of the Supreme Court, and obtain an order compelling commissioners of adjoining towns to unite in building bridges, to be paid out of funds in their hands, and what expense

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was not so paid, to bring in an account therefor to the supervisor, and the board of supervisors shall levy a tax on the town for its share. Thus the claim should have been presented, either to the board of town audit, or directly to the board of supervisors.

IV. The court erred in refusing to nonsuit the plaintiff, on the ground that the action was improperly brought in Cattaraugus county. "Actions by the county or town officers of one county, against the town or county officers of another county, in their official capacity, shall be laid in some county adjoining the county of the defendants, except the county of the plaintiffs." (*Laws of 1842, ch. 301. 3 R. S. 634, 5th ed.*) This could be taken advantage of under the general issue. (*3 R. S. 634, § 9.*) It is evident that section 125 of the Code has no application to actions commenced in a justice's court.

S. S. Spring, for the respondent.

I. Upon the trial of this action at the circuit court, the court, upon the application of the plaintiffs, allowed the complaint to be amended by striking out the name of Hudson Waite as one of the plaintiffs in this action. Did the court commit an error in so doing? Probably the court, at the circuit, had the same jurisdiction to grant amendments to pleadings in this case that the county court would have had, if the action had been tried in that court, but no greater; as the action originated in a justice's court, and was certified by the county judge. In the case of *Ackley v. Tarbox*, (31 N. Y. 564,) the action originated in a justice's court, and was brought for the conversion of one cow. The cow was the individual and separate property of one of the plaintiffs, who was a married woman, but her husband was joined with her in the action, as co-plaintiff. The plaintiffs, in a justice's court, obtained judgment for the value of the cow converted. An appeal was taken, upon questions of law only, to the

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county court, where the judgment was affirmed; but upon an appeal to the Supreme Court, the judgment was reversed, upon the ground that the husband should not have been joined as co-plaintiff. An appeal was then taken to the Court of Appeals, and that court reversed the judgment of the Supreme Court, and affirmed that of the county court and the justice's court. Judge Davies, in giving the opinion of the court, after remarking that the husband was improperly joined as co-plaintiff, said: "Section 173 of the Code was framed to meet a case like the present. It declares that the court may, both before and after judgment, in furtherance of justice, amend any pleading, process or proceeding, by adding or striking out the name of any party. As soon as the objection was taken, that the husband was an unnecessary party, as he clearly was, it was the duty of the court to have stricken his name from the proceedings in the action. It can now be done, and the judgment stand as it ought, a judgment in favor of the wife for injury to her personal property." The entire court concurred, excepting Judge Johnson, who wrote a dissenting opinion, to the effect that the section of the Code above referred to had no application to justices' courts. As the appeal in the case last cited was from a judgment of a justice of the peace, upon questions of law only, it directly involves the jurisdiction of such justice to grant an amendment to the complaint by striking out the name of one of the plaintiffs in the action. That the justice had no such power independently of the Code, even in an action for a tort, is entirely apparent. (*Cowen's Treatise*, 557, 2d ed.) The Court of Appeals expressly placed its decision upon the ground that the provisions of the Code relating to striking out names of parties, and rendering judgment for or against one or more of several plaintiffs, and for or against one or more of several defendants, is applicable to justices' courts. There is no decision of the Court of Appeals which has been made since the de-

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cision of the case of *Ackley v. Tarbox*, (*supra*), which professes to overrule that case, or is at all inconsistent with it.

II. But the appeal, in this case, was for a new trial in the county court, not to correct any errors that the justice committed herein, by an appeal upon questions of law. The Code expressly makes all the provisions contained therein as to amendments, by striking out the names of parties, as well as the provision that judgment may be given for or against one or more of several plaintiffs, applicable to county courts, upon such new trials therein. Section 8 of the Code, provides "that this act is divided into two parts; the first relates to the courts of justices and their jurisdiction; the second relates to civil actions commenced in the courts of this State after the 1st day of July, 1848, and is distributed into fifteen titles. The first four relate to actions in all the courts in the State, and the others to actions in the Supreme Court, in the county courts, &c." The section does not provide that the entire second part of the Code shall only be applicable to the class of actions which are originally commenced in that court, as distinguished from those that are brought there by appeal from justices judgments; but it says all actions in the county courts. Section 366, subdivision 4, provides that "Every issue of fact so joined, or brought upon an appeal to the county court, shall be tried in the same manner as in actions commenced in the Supreme Court." Subdivision 5, of the same section, provides "That the court shall have the same power over its determinations, and the verdict of the jury, and shall render judgment thereon in the same manner as the Supreme Court, in actions pending therein." The general term of the Supreme Court have decided that in new trials in the county court, on appeals from justices' judgments, judgment in the county court, upon such new trial, can be rendered in excess of \$200 for damages, and therefore in excess of the justices' jurisdiction as to the amount of the judgment for damages.

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III. The defendant objected upon the trial to the introduction of the contract for constructing the bridge in question, on the grounds. 1st. It does not appear to have been executed by the parties, as commissioners of highways. 2d. It appears to have been executed by the respective towns, as towns. The proof shows that all of the persons who acted for their respective towns in making such contract, were in fact highway commissioners for such towns, and that the nature of the contract is such as they, as such commissioners, had in law a right to make. The parol evidence also shows, that such commissioners did in fact make the contract in their capacity of highway commissioners. This case has been before this court for adjudication, once before; and this same question was then adjudicated by this court. Upon that occasion his honor Justice Mullin, in giving the opinion of the court, remarked: "I am of the opinion that the written contract was binding on the commissioners of the towns. If, however, it was void, they were unquestionably bound by the contract as made by parol, and being valid, all these commissioners were liable upon it."

IV. It is claimed that this action could not be brought in Cattaraugus county. 1. The Code provides, (see section 124,) "That actions for the following causes, must be tried in the county where the cause, or some part thereof, arose, subject to the like powers of the court to change the place of trial." Subdivision 2, of said section, "Against a public officer, or a person specially appointed to execute his duties." It arose in a part of Cattaraugus county. 2. The question was not raised in the justices' court. The defendant by appearing, and proceeding to the trial of the action, in the justices' court without raising the objection, did thereby waive the same, and after having once waived the same, it was not afterwards available to him upon the trial in the county court. (*Stevens v. Benton*, 39 *How. Pr.* 13.)

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V. What proportion, relatively, of the expenses is Sardinia bound to incur in building and maintaining the bridge in question? The theory of the law seems to be that each town shall maintain its own roads and bridges. And as one half of the entire bridge in question is in the town of Sardinia, it seems just and equitable that that town should incur one half the expenses of maintaining such bridge. Would there be any doubt whatever as to that town being liable to one half of such expenses, provided the entire other half of such bridge was only in one of the other two towns? Does the circumstance that the other half of said bridge happens to be in two, instead of only in one town, affect at all the relative proportion of the expenses which Sardinia should pay towards the maintenance of said bridge? Upon what principle can such a circumstance enure to the benefit of Sardinia? For, notwithstanding such circumstance, one half of the entire creek, over which such bridge is maintained, is in the town of Sardinia. Chapter 383, section 1, of the laws of 1857, is not inconsistent with such liability. That act makes the several towns jointly and severally liable for the entire expense of making and maintaining bridges over streams of water dividing such towns. The act makes such towns jointly and severally liable to those who have been employed by their highway commissioners to build or repair such bridges. (*Harris v. Houck*, 57 Barb. 619.) The act, however, does not define how much, relatively, as between themselves, the several towns shall pay. This court, however, when the case was before it, adjudicated upon that question, and decided that Sardinia was liable to pay one half of all such expenses. (See opinion of Justice Mullin.)

VI. The court at the circuit only gave judgment for the amount which the commissioner for the town of Yorkshire had paid in excess of one quarter, for building the bridge, and the interest thereon from the time of such

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payment. Inasmuch as each of the commissioners was jointly and severally liable to the contractor to pay the whole amount for building such bridge, whatever sum either of said commissioners paid in excess of the relative proportion which, as between themselves, he was bound to pay, he is entitled to recover of the commissioner who has been guilty of default in paying his due proportion, upon the theory that the commissioner making such excessive payment, paid the same as surety for the commissioner for whose benefit such excessive payment was made.

By the Court, TALCOTT, J. This action was originally commenced before a justice of the peace of the town of Machias, in the county of Cattaraugus. It was originally brought by John Corey, commissioner of highways of the town of Yorkshire, in Cattaraugus county, and Hudson Waite commissioner of highways of the town of Ashford, in the same county, against Alfred Rice, commissioner of highways of the town of Sardinia, in the county of Erie.

The suit originated in the following facts: The town of Sardinia, in Erie county, is situated on one side of the Cattaraugus creek. On the other side, and opposite to Sardinia, are the towns of Yorkshire and Ashford, in Cattaraugus county. Each of the three towns extends to the center of the creek. A highway divides the towns of Yorkshire and Ashford, and extends across the creek into and through Sardinia. A bridge across the creek constitutes a part of this highway. The entire north half of the bridge is in the town of Sardinia; the south half is in the towns of Ashford and Yorkshire. The highway commissioners of the three towns jointly entered into a contract with one L. Corey, whereby he agreed to construct the bridge in question at a certain price. The contractor performed the work, and each of the commis-

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sioners paid to him one third of the contract price. The commissioners of Yorkshire and Ashford being afterwards advised that the town of Sardinia was liable to pay one half, instead of one third, of the expense of constructing the bridge, brought this action to recover the proportionate excess paid by the commissioners of the towns of Ashford and Yorkshire respectively, over and above the amount for which it is claimed such towns are respectively liable. The action was tried before the justice, and he rendered a judgment against the plaintiffs for costs. The complaint of the plaintiffs, before the justice, demanded judgment for \$200. The plaintiffs appealed to the county court of Cattaraugus county, for a new trial.

Upon what ground judgment was rendered for the defendant, before the justice, does not appear, as the testimony and proceedings on the trial are not returned. While the cause was in the county court, undetermined, Mr. Spring, who had been counsel for the plaintiffs, became the county judge of Cattaraugus county, and thereupon certified the case into the Supreme Court, under the statute. (*Code*, § 30.) In the justice's court, the defendant answered by a general denial, and also in his answer claimed that the plaintiffs could not maintain the action jointly. After the appeal, the cause was once tried in the county court, where the plaintiffs recovered judgment, which, on appeal to the general term of this court, was reversed upon the ground that the plaintiffs, conceding that each had paid in excess of the liability of his town toward the expense of constructing the bridge, could not, nevertheless, maintain a joint action to recover the excess which each had paid. Since the case has been in the Supreme Court, the now plaintiff, Abram Lapham, having become commissioner of highways of the town of Yorkshire, in place of Corey, was substituted as one of the plaintiffs in place of Corey, who had died. The action was afterwards tried at the circuit in Cattaraugus county.

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And on the trial an amendment of the complaint was allowed, whereby the name of Hudson Waite, as plaintiff, was stricken out, and the complaint was dismissed as to him, (*see Ackley v. Tarbox*, 31 N. Y. 564,) and the trial proceeded in the name and behalf of Abram Lapham as commissioner of the town of Yorkshire, in Cattaraugus county, as sole plaintiff, and a judgment was ordered in his behalf for \$27.11, the excess paid by the commissioner of the town of Yorkshire over one quarter of the expense of building the bridge, besides costs. On this trial, the defendant moved for a nonsuit, stating amongst other grounds, that the action was improperly brought in the county of Cattaraugus. The defendant appeals from the judgment rendered against him at the Cattaraugus circuit, and amongst other objections claims that the plaintiff should have been nonsuited, because the action was improperly brought in Cattaraugus county, and therefore could not be maintained. To this objection we do not discover any satisfactory answer. By chapter 301 of the laws of 1842, it is provided that "actions by the county or town officers of one county, against the town or county officers of another county, in their official capacity, shall be laid in some county adjoining the county of the defendant except the county of the plaintiffs."

This is an action by a town officer of the town of Yorkshire, in Cattaraugus county, and is brought against a town officer of another county. The plaintiff sues, and the defendant is sued in his official capacity. The case is precisely within the act of 1842, referred to, and the justice of the peace in Cattaraugus county had no power or jurisdiction to entertain such a suit, nor could it have been tried in the circuit court of Cattaraugus county, if the suit had been originally commenced in this court, and the objection had been taken at the proper time and in the proper manner. It is stated in the points of the respondent's counsel, that the question was not raised in the

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justice's court, and he claims that for that reason it was waived. Conceding, for the purpose of the argument, that the official sued contrary to the provisions of the act referred to, may waive the objection so as to confer upon a justice in the plaintiff's county, jurisdiction to try the action, the inquiry arises, what constitutes a waiver. At the common law where the venue, in a local action, was laid in a wrong county, and the objection appeared upon the declaration or record, it could be reached by demurrer, and perhaps in no other manner; but where the objection could not be reached by demurrer, it was a ground of nonsuit. (12 *Wend.* 51. *Id.* 265.) The objection now raised to the maintainance of the action did, it is true, appear on the face of the complaint in the justice's court; but the only demurrer to a complaint which is allowed in that court, by the present law, is when it is not sufficiently explicit to enable the defendant to understand it, or when it contains no cause of action. Neither of these causes of demurrer applies to an objection that the action is brought in a wrong county.

Although in the summons in this case the official titles of the respective parties are stated, yet it is not stated that the plaintiff sues, or the defendant is sued in his official capacity; upon the well settled rule the statement of the official title of the parties in this case strictly operated as a mere *descriptio personæ*. As such it was mere surplusage, and would not have prevented the plaintiff from complaining against the defendant in regard to a mere private matter existing between the two, and unconnected with the official capacity of either.

Consequently, a dismissal of the suit before the complaint was put in, which showed that the action was connected with the official character of the parties, would have been erroneous. There seems, therefore, at present to be no method by which, in a justice's court, the defendant, in such a case as this, can avail himself of the

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objection, except as a ground of nonsuit on the trial, as at common law, where the objection was not open to a demurrer. The counsel for the appellant, as before stated, says that the defendant did not make this objection, on the trial before the justice. This may be so, but the record does not show that such was the case. In this case the justice was not required to return, and has not returned, what took place on the trial.

Besides, on a new trial, the party respondent, on appeal from a justice's court, cannot be confined, on the trial, to the objections he made in justice's court. Those objections are in no manner legally made known to the appellate court. On a new trial there, as upon any other new trial, the parties are entitled to take any ground permissible under the pleadings. The defendant never had any occasion to raise this objection, until after the amendment was allowed by which it was permitted to strike one of the joint plaintiffs from the record, and proceed with the suit in the name of the other; as the misjoinder which had, up to that time, existed was sufficient, as was held by this court, to defeat the action.

In actions in the Supreme Court, if the county designated in the complaint for the trial be not the proper county, the action may, nevertheless, be tried there, unless the defendant shall, before the time for answering expires, demand, in writing, that the trial be had in the proper county. (*Code*, § 126.)

This obviously can have no application to a justice's court. No county is designated in that court as the place of trial, and it has no power to change the venue. In that court, the objection that the action is brought in a wrong county, if well founded, must necessarily defeat the action itself.

The judgment must be reversed; and as the objection goes to the foundation of the action, and cannot be ob-

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viated, there is no necessity or propriety in putting the parties to the expense of a new trial.

Judgment reversed, and judgment ordered for the defendant, with costs.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Johnson, Talcott and Barker, Justices.]

WADLEY and others vs. DAVIS.

Customs must be reasonable, and not contrary to the general principles of law. A usage of a particular trade may sometimes be proved with the view of raising the presumption that the parties contracted with knowledge of, and reference to it, so that it entered into and became a part of the contract.

In such a case, it must be shown that the party against whom the usage is set up had notice of it, at the time of making the contract, or it must be shown to have been so long contigued, universal and notorious that all persons may be presumed to have had notice of it.

A custom to the effect that a person employed to cut staves from another's bolts has a right to take, and appropriate to his own use not only the clippings and corner pieces but the culls, without the consent or agreement of the owner, cannot be sustained.

Such a custom is not only not in harmony with law, but is manifestly against public policy.

To allow a mechanic or artisan, who works up the materials of another, to keep so much of such materials as is not used for the benefit of the owner of the materials is to array his interests in direct opposition to those of his employer. *Per TALCOTT, J.*

In an action by the owners of a stove-mill, to recover, upon a contract, for cutting a quantity of staves, at their mill, for the defendant, at a certain price per thousand, a claim of the defendant against the plaintiffs, for converting to their own use a large quantity of the staves, cull staves and corner pieces, made from the stove bolts of the defendant, which were drawn to the plaintiffs' mill to be cut into staves, arises out of the plaintiffs' claim, and is connected with the subject of the action. Hence it is admissible as a counter-claim, under the Code, (§ 150.)

APPEAL from a judgment for the plaintiffs, rendered in this court on the report of a referee, and from an order of the Oswego special term, denying a new trial.

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W. A. Poucher, for the appellant.

C. Whitney, for the respondents.

By the Court, TALCOTT, J. This action was originally commenced before a justice of the peace of Oswego county. The action is upon contract, and before the justice the plaintiffs recovered a judgment for \$169.25 damages, and \$8.05 costs. From this judgment the defendant appealed to the county court of Oswego county, not, however, stating in his notice of appeal that the appeal was taken on questions of law only. In the county court the action was referred to a referee to hear, try and determine. The referee reported in favor of the plaintiffs, and ordered judgment for them for the sum of \$157.27 damages.

The defendant made a bill of exceptions, with a view to move thereon to set aside the report of the referee, but before the case was brought to argument in the county court, Mr. Whitney, who had been the attorney for the plaintiffs in the county court, became the county judge of Oswego county, and duly qualified as such. Thereupon Judge Whitney certified the case into the Supreme Court, under the provisions of section 30, subdivision 13, of the Code. Pursuant to the provision of that subdivision a motion for a new trial was made, at the Oswego special term of this court, on the case and exceptions. The motion was there denied, and thereupon judgment for the plaintiffs was entered in the Supreme Court, on the report of the referee.

From the order refusing to set aside the report of the referee, and from the judgment, the defendant appeals to the general term.

The plaintiffs owned a stave mill, and this action is brought to recover the amount claimed to be due to them from the defendant for cutting a quantity of staves for the defendant, at a certain price per thousand. But one

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question of law is presented on this appeal. That question arises under the following circumstances. The defendant, in his answer, alleges, amongst other things, that the plaintiffs converted to their own use a large amount of the staves, cull staves, and corner pieces, made from the stave bolts of the defendant, which were drawn to the plaintiffs' mill to be cut into staves; that the same were the property of the defendant, and were of the value of \$150, and the defendant claims damages against the plaintiffs.

On the trial, it appeared from the cross-examination of one of the plaintiffs, that they had converted to their own use some of the culls and corner pieces from the defendant's bolts. The culls are understood to be such bolts as are separated from the others, as not being proper to be converted into staves, by reason of some defect. The corner pieces are pieces cut in the process of manufacture from the bolts which are made into staves, some of these culls and bolts had been by the plaintiffs consumed at the mill, some were used as fuel at the house of one of the plaintiffs, and some were sold in the village, by the cord. On the direct examination resumed, the plaintiff was asked by his counsel, "What has been the custom about who was to have the culls and corner pieces?" This question was objected to by the defendant, "on the ground, that any custom that the cutter was to have the corner pieces and culls of stave bolts received to be cut for customers was contrary to law and public policy." The objection was overruled, and the witness answered: "It has been customary to use all culls and corner pieces, no one ever claimed them, or got them."

Other witnesses, to the number of two or three, testified that the clippings and corner pieces, by custom, belonged to the cutter, or at least, that they had never heard of their being claimed by the owner. Clippings are understood to be pieces cut off in the process of manufacture.

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The case states that when the defendant was upon the defence, he "offered to introduce further proof of the amount and value of the corner pieces and cull staves made from the appellant's stave bolts, and which the respondents converted to their own use," but the referee excluded the evidence, and ruled and decided "that the respondents were entitled to said corner pieces and cull staves, by the custom." The defendant excepted to the decision.

A usage of a particular trade may sometimes be proved, with a view of raising the presumption that the parties contracted with knowledge of and reference to it, so that it entered into and became a part of the contract. In such a case, it must be shown that the party against whom the usage is set up had notice of it at the time of making the contract, or it must be shown to have been so long continued, universal and notorious that all persons may be presumed to have had notice of it. There was no claim in this case that the defendant had any notice of the usage claimed; nor was the evidence sufficient to establish notice by presumption. (*Wood v. Hickok*, 2 *Wend.* 501.)

In the case cited it was held that the testimony of one witness that it was the custom of all grocers to charge interest after ninety days, was not sufficient to charge the defendant with the liability to pay such interest. In this case it is to be observed that nobody but the plaintiff himself pretends to the existence of any custom that the cutter was to have the culls.

In this case the referee did not put his ruling upon the ground that it was a part of the contract, presumptively or expressly, but upon the sole ground that the evidence established a custom, to the effect that the person employed to cut staves from another's bolts, was entitled not only to the clippings and corner pieces, but to the culls. As a custom, it cannot be upheld. Customs must be reasonable, and not contrary to the general principles of law.

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A custom which is unreasonable, and in opposition to the general principles of law, is void. (2 *Greenl. Ev.* § 249.) As is said by the court, in *Homer v. Dorr*, (10 *Mass.* 26 :) "The usage of no class of citizens can be sustained in opposition to the principles of law." The property in the culls and corner pieces was vested in the defendant. They were of value, as appears by the plaintiffs' own showing, and were an article of merchandise. The defendant might have parted with them by contract. Perhaps a license to take them might be inferred from their having been suffered to remain unclaimed, for a sufficient length of time, in the plaintiffs' mill yard. But a custom for the cutter to take and appropriate them to his own use, without the agreement or consent of the owner, cannot be sustained. Such a custom is not only not in harmony with law, but manifestly against public policy.

To allow a mechanic or artisan, who works up the materials of another, to keep so much of such material as is not used for the benefit of the owner of the material, is to array his interests in direct opposition to those of his employer. This is strongly illustrated in the case of the culls. It appears that in this instance the plaintiffs, and their employees, culled the defendant's bolts, and such we understand, from the evidence, to be the general practice. If the culler is to be entitled to all the bolts which are determined by him to be unfit for staves, he is under a very direct temptation to cull in a careless, not to say fraudulent, manner, so as to increase his own profit at the sacrifice of the interests of his employer. Such a custom, as a custom, binding upon the owner of the property, is unreasonable, contrary to public policy, and cannot have the sanction of law. At the following references will be found some of the cases in which customs have been held to be void, because in opposition to principles of law and public policy. (25 *Wend.* 673. 8 *N. Y.* 690. 18 *Barb.* 290. 12 *Pick.* 107. 14 *id.* 141. 21 *id.* 483. 3 *Yeates*, 318. 6 *Bin-*

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ney, 416. 4 *Rawle*, 195. 1 *Watts*, 360. 2 *Wash. C. C. R.* 24.)

The plaintiffs cannot justify the appropriation of the defendant's property by proving any custom to take the property of others. They must show his consent, either expressly, or by circumstances that will authorize the inference. The facts set up in the answer, and sought to be proved by the defendant, arose out of the contract and transaction set forth in the complaint as the foundation of the claim of the plaintiffs, and was connected with the subject of the action. It was therefore admissible as a counter-claim under the Code. (§ 150.)

The other questions presented by the appellant all relate to the findings of fact. It being necessary to order a new trial upon the point already considered, it is unnecessary to compare the findings of the referee with the evidence.

Judgment and order appealed from reversed; new trial ordered; costs to abide the event, and order of reference vacated.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Mullin, Johnson and Talcott, Justices.]

DAY and others vs. POOL and others.

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A purchaser of personal property to be delivered at a future day may, by *express contract*, relieve himself from the obligation to return the property on discovering its inferiority, and still hold the vendor responsible for the deficiency in quality.

He may do this by taking an *express warranty*, at the time of the purchase, that the goods, when delivered, shall possess the particular qualities which it is important for him to secure.

The cases of *Hargous v. Stone*, (5 N. Y. 78,) and *Reed v. Randall*, (29 *id.* 358,) expressly recognize the right of a vendee, upon an executory sale, to protect himself against the contingency of being obliged to use, at his own risk and loss, an inferior article or to be deprived of it altogether, when to attempt to supply its place might be attended with great inconvenience and loss. That the mode of effecting this object is by exacting an express warranty. And that in such a case, the doctrine of warranty applies, at the option of the vendee, to the same extent as if it were an executed sale; in which latter case, it is well settled that the vendee is under no obligation to return the property on ascertaining that it does not fulfill the warranty, but may keep it, and rely on the warranty for redress.

The plaintiffs on purchasing from the defendants 80 barrels of rock candy syrup, to be used by them in the manufacture of wine, observed to the defendants' agent that in some syrups they had seen, sugar would fall down, and some would crystallize to candy; to which the agent replied, "Our syrup will not crystallize, nor sugar fall down. I warrant our syrup all right." *Held* that this representation, in connection with evidence that the purchase was of rock candy syrup, that it was so billed to the plaintiffs, and that rock candy syrup will not crystallize, or the sugar fall down, tended to show an express warranty that the syrup to be delivered under the contract should be rock candy syrup, or at least, syrup which would not crystallize, or deposit the sugar.

Held, also, that the interpretation of this conversation, and what particular warranty was intended, was a question for the jury.

The plaintiffs notified the defendants that they had some doubts whether the sugar sent them was such as had been bargained for, and had some suspicions it was not, but were inclined to risk using it. The defendants, instead of cautioning the plaintiffs against using the sugar if it was not of the quality ordered, or offering to take it back, replied in a way calculated to induce them to go on and use the syrup, and to lead them to repose upon the idea that they, the defendants, would make the matter right. *Held* that the idea that both parties supposed they were acting under an express warranty, was strengthened by this correspondence.

Held, also, that if the defendants, on receiving this notification, were not absolutely called upon to caution the plaintiffs against using the syrup, if they intended to insist that by using it the plaintiffs would waive all claim against

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them for any deficiency of quality, certainly fair dealing would not permit them to lull the plaintiffs into security, by suggesting, in ever so vague a manner, that the defendants would make a fair deduction if the quality of the syrup was not up to the contract.

A PPEAL, by the plaintiffs, from a judgment of nonsuit ordered at the Chautauqua circuit.

C. D. Murray, for the appellants.

I. This being a sale by sample, there is in law a warranty that the bulk of the goods sold correspond with the sample exhibited. (*Waring v. Mason*, 18 *Wend* 425. *Beirne v. Dord*, 5 *N. Y.* 95.) And cases cited by Jewett, J., where he says, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the purchaser, that all the goods are similar, both in nature and quality, to those exhibited; and if they be not, the purchaser may either rescind the contract by returning the goods in a proper time, or keep them and recover damages for the breach of such warranty. (*Id.* 99.) But in this case, there is the express agreement on the part of the defendants, that "our syrup will not crystallize, or sugar fall down." Upon this point then, the question is squarely presented. Upon a sale of goods, with an agreement to deliver at a future day, where there is an express warranty as to quality, does the right of action for a breach of the warranty survive the receipt of the goods and a reasonable time to examine, without notice of defects and offer to return? This case was decided upon the authority of *Reed v. Randall*, (29 *N. Y.* 358.) We submit, that *Reed v. Randall* does not decide any such question, but expressly limits the doctrine enunciated to a case of *implied* warranty, and states: "It is understood of every contract for the future sale and delivery of an article of merchandise, even without express terms, that it shall be of a merchantable quality." And upon the delivery of property pursuant to such a contract,

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&c., the learned justice applies the rule. (*Id.* 393.) At page 362, he states: "A warranty, then, cannot be predicated upon the contract alleged in the complaint; and the rules of law, by which the rights of parties in respect to warranties are regulated, are inapplicable." The same construction and rule is again enunciated in *Foot v. Bentley*, (44 N. Y. 166,) and Gray, commissioner, citing the case of *Reed v. Randall*, says: "The facts in that case did not, as the court decided, constitute a warranty, and it was disposed of on that ground." (*Id.* 170.) He further says, "in this case the warranty is found as a fact. No obligation, therefore, existed requiring the plaintiffs to return, or offer to return the property warranted;" citing *Muller v. Eno*, (14 N. Y. 597.) The same rule is established in *McCormick v. Sarson*, (45 N. Y. 265.) Judge Peckham, after citing the rule and the cases decided, including *Reed v. Randall*, adds: "This is the rule in the absence of any fraud or warranty. No fraud or warranty was claimed, or offered to be proved in this case." (*Id.* 268.) The main difference in the cases cited, and our case, is this: There was an express warranty that we should receive rock candy syrup, within a given time, and that it should not crystallize, or sugar fall down in it, and for the breach of that contract this action is brought. The case of *Neaffie v. Hart*, (4 Lans. 4,) presents the question precisely as presented in *Reed v. Randall*. That is on an implied warranty, and as Justice Johnson squarely puts the point, the question was, whether the plaintiff had fulfilled his executory contract. Here, the plaintiffs did notify the defendants of the defects in the syrup, and that it was not coming forward according to agreement.

II. This syrup was bought for the manufacture of wine. The defendants were notified that the plaintiffs wanted it for that purpose and nothing else. That they wanted syrup that would not crystallize, or sugar fall down. That they were to commence the manufacture of wine about

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the 15th of October. Mr. Clark says: "I have always been trying to sell it to you, and now I want you to give us a chance. Our syrup will not crystallize, or sugar fall down." Upon the purchase of this syrup for a specific purpose, and a full disclosure of its qualities necessary to make it fit for that purpose, and the representations made by the defendants as connected therewith, this case comes within the case of *Randall v. Roper*, (97 *Eng. Com. Law*, 82,) cited in *Passinger v. Thornburn*, (34 *N. Y.* 637.) Also an unreported case in this eighth district, the opinion written by Judge Barker, where the report of a referee was sustained, who gave a report in favor of the plaintiff, on the purchase of two bags of large clover seed, the plaintiff representing to the seller—a grocery house in Buffalo—that he wanted the large kind to sow, and was going to sow it, and the seller warranted the seed to be the large kind. This case, in principle, also comes within the rule of *Park v. The Morris Axe and Tool Company*, (4 *Lans.* 103;) *Passinger v. Thornburn*, (34 *N. Y.* 634, and cases cited in the opinion.)

III. It was error to refuse to submit to the jury the question of the amount of damages the plaintiffs had sustained for a failure to deliver according to agreement.

J. S. Russell, for the respondents.

I. The case shows that the contract was executory; it had none of the elements of a sale. The syrup was not then manufactured, but was to be thereafter procured by the defendants; was not and could not be designated, and the defendants had not done every act in regard to it that they were required to do before the title would pass to the plaintiffs, without which it could not have been an executed sale. A subsequent delivery to an undesignated carrier would not pass the title, or take the case out of the statute of frauds. (*Rodgers v. Phillips*, 40 *N. Y.* 519.)

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11. The contract being executory, the plaintiffs' remedy to recover damages, on the ground that the syrup furnished did not correspond with the contract, did not survive acceptance by the plaintiffs, after opportunity to ascertain its defects; unless the plaintiffs offered to return it, or refused to receive it, or gave notice to the defendants to take it back on account of the defects, properly stating them in such notice. The retention of the syrup by the plaintiffs, without such offer or notice, is a conclusive assent on their part, that the contract has been performed, both as to quality of article and the time of delivery. (*Reed v. Randall*, 29 N. Y. 358. *Howard v. Hoey*, 23 Wend. 350. *Hart v. Wright*, 17 id. 275. *Neaffie v. Hart*, 4 Lans. 4. *Leavenworth v. Packer*, 52 Barb. 133. *Fitch v. Carpenter*, 43 id. 43. *Muller v. Eno*, 4 Kern. 601. *McCormick v. Sarson*, 45 N. Y. 265; *opinion by Peckham*.) 1. The case shows the plaintiffs had ample opportunity to ascertain the defects of the syrup before its appropriation by them in the manufacture of wine. Ryckman, one of the plaintiffs and business manager of the firm, was an expert, and knew rock candy syrup; also his men were experts. They did discover the defects in the syrup for which they now seek to recover, from time to time, as each lot arrived, and before they had appropriated it to their use; and after such discovery used it in the manufacture of wine, depriving the defendants of the opportunity of an examination that might enable them to test the quality of the syrup, and show by experts its conformity to the quality agreed to be procured and delivered. 2. The evidence nowhere shows that the plaintiffs refused to receive the syrup on the contract, or offered to return it, or gave notice to the defendants to take it back. They commenced to receive it September 20, 1870, and the last lot was shipped November 4, and received some four days later. The first letter from the plaintiffs to the defendants

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finding any fault with the syrup, was dated November 20, some twelve days after the last lot had been received by them, and after all the syrup had been consumed by them in the manufacture of wine, and after all had been paid for except the last six barrels. The notice sent by Captain Fay was that they were dissatisfied with the syrup, and that they were not receiving it in time. Captain Fay, as the plaintiffs' agent, did not refuse to receive it, or offer to return it, or notify the defendants to take it away, but directed the defendants to send some more.

III. The fact that a sample was selected as a guide to the defendants to determine the quality of the syrup to be, by the defendants, procured and delivered, does not change the contract to a sale. It is still executory, and the plaintiffs' rights consisted in requiring the delivery of an article to correspond, and they were not required to accept an inferior article. If they have done so without requiring a warranty upon the delivery, they are without remedy. (*Sprague v. Blake*, 20 Wend. 61.)

IV. The question of offer to return and notice of defects, was a question of law, there being no conflict of evidence upon the subject. The plaintiffs requested this question to be submitted to the jury. There being no conflict of evidence, the court refused. The action having been brought for damages, after acceptance, the court held that time and quality had been waived; that the plaintiffs' right of action did not survive.

The only questions presented by the plaintiffs' exceptions are, whether the court was right in holding as matter of law upon a conceded executory agreement, that the acceptance and conversion of the syrup, without fraud or warranty on delivery, on the part of the defendants, was a waiver by the plaintiffs of any claim for damages, for non-performance in quality or time. The question of warranty upon the sale is not raised by the exceptions.

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TALCOTT, J. The defendants are merchants in New York, dealing in syrups. The plaintiffs are manufacturers of wine, at Brocton, in Chautauqua county. In September, 1870, the plaintiffs, by parol, made an executory contract to purchase of the defendants eighty barrels of rock candy syrup, to be used by the plaintiffs in the manufacture of wine. At the time of the order given by the plaintiffs to the defendants, several samples of syrups were exhibited by the defendants, one of which was selected by the plaintiffs, and the order given for syrup of that description. At the time of the agreement for the purchase, the agent of the plaintiffs stated to the agent of the defendants, that in some syrups he had seen, sugar would fall down, and some would crystallize to candy. To which the agent of the defendants replied: "Our syrup will not crystallize, or sugar fall down; I warrant our syrup all right." The sugar was not owned by the defendants, at the time of this contract, but it was understood that it was to be subsequently procured by them of the manufacturers in Boston. The syrup was forwarded to the plaintiffs, in different lots, and by them received and used. There is a syrup made from sugar, called in the trade, sugar syrup, which is of a quality and price inferior to the rock candy syrup; and syrup in which the sugar falls down and crystallizes is much less valuable for use in the business of the plaintiffs than that in which this does not occur. The syrup was sent to, and received by the plaintiffs, in eight different lots of from six to twelve barrels each, and used by the plaintiffs upon arrival, and was paid for by the plaintiffs' remittance about the same time, except the last lot, which was paid for the following spring, and after the plaintiffs had claimed that the syrup was not of the description and quality agreed to be sent, and was not sent at the time agreed on, and demanded a rebate on this account, which was refused. This action is brought upon the allegation of a sale of syrup by the defendants to the plaintiffs,

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with a warranty that the same was pure and clear rock candy syrup, and that it would not thicken to candy, and was, in all respects, of the best quality. And also upon the ground that the syrup was not delivered in season, according to the contract. On the trial, the plaintiffs gave evidence tending to show that the syrup which was sent them by the defendants, was not rock candy syrup, but was sugar syrup. That the sugar therein did crystallize and settle. That the contract called for an earlier shipment than had been made, and tending to show that they had sustained considerable damage, by reason of the inferior quality of the syrup and the delay in the shipment of it. The evidence of the plaintiffs also tended to show that the quality of the syrup could be detected on examination before using. That the inferior quality of this syrup, and the fact that the sugar in it did settle, was in fact discovered and known to the plaintiffs at the time they used it. It furthermore appeared that on the receipt of the second lot of the syrup, the plaintiffs wrote to the defendants, as follows: "We opened one barrel and find that this syrup crystallizes, but it looks well. If it is all right, then we shall have no trouble, but looks like sugar syrup; but we expect it will be rock candy syrup. If so, all is well." While they were receiving the syrup, the plaintiffs also sent back a sample of that received to the defendants, with notice that they, the plaintiffs, were dissatisfied with it, and the quality was not such as they expected. The defendants professed to be ignorant that they had sent such syrup as the sample so returned, and said they had examined most of the syrup sent and supposed it to be good. At the close of the testimony, the defendants moved for a nonsuit, on the ground that the agreement being executory, and the syrup having been delivered under it, and the plaintiffs having received it with a knowledge of its quality, and converted it to their own use, without any offer to return the same, or notice to the defendants that they

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would not receive the same upon the contract, could not recover in this action. The plaintiffs claimed the right to go to the jury, but in the statement of their position did not controvert the idea that the quality of the syrup was ascertainable and its inferior quality known to the plaintiffs before they used it, or suggest the submission of that question to the jury.

It is held in *Reed v. Randall* (29 N. Y. 358) that "in cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee, after opportunity to ascertain the defect, unless notice is given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent on his part that the contract has been performed. He is not bound to receive and pay for a thing which he has not agreed to purchase; but if the thing purchased is found, on examination, to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality." The same doctrine is also laid down in *Hargous v. Stone*, (1 *Seld*, 73,) and this, according to both the cases referred to, is the rule where there is an implied warranty; such, for instance, as that the article shall be of a merchantable quality. The case of *Reed v. Randall*, was the case of the purchase of a certain crop of tobacco, then growing. The defendant agreed to sell the crop of tobacco, and to deliver the same to the plaintiffs, well cured and boxed, and in good condition, at such place in Syracuse as the plaintiffs should thereafter designate, the early part of May then next. The plaintiffs paid a part of the purchase money down, a further sum thereafter, and the balance on the day of the delivery of the tobacco, which was de-

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livered, in pursuance of the notification of the plaintiffs, at a storehouse in Syracuse. The action was brought by the plaintiffs setting forth the contract, the payment and delivery, and alleging that the defendant did not perform the agreement on his part, and did not deliver the crop of tobacco, well cured and boxed, and in good condition, but on the contrary thereof, a large portion of the tobacco was in a bad condition at the time of the delivery thereof, and had not been properly cured, but was wet, sweaty and rotten, which was unknown to the plaintiffs when they received the same; by reason of which the value was greatly deteriorated, and the plaintiffs were put to great trouble and expense in overhauling, separating and repacking the same, and had sustained damage thereby. On the trial, the defendant's counsel objected to the sufficiency of the complaint to maintain the action, for the reason that it did not appear that the plaintiffs, on discovering the condition of the tobacco, had offered to return it, or notified the defendant of its condition, and it being admitted that the plaintiffs had no evidence that they had notified the defendant of the condition of the tobacco, or had returned or offered to return it, a nonsuit was directed, which nonsuit was affirmed in the Supreme Court and in the Court of Appeals.

In the prevailing opinion, delivered by Judge Wright, he says: "This conclusion, I think, was right. It is not claimed to be otherwise, unless there was a warranty that the tobacco, when delivered, should be well cured and in good condition. But the stipulation, in respect to the quality and condition of the article when delivered, *constituted no express warranty*. The contract was executory, for the sale of a growing crop of tobacco to be delivered the spring following, well cured and in good condition. The article bargained for, and to be furnished in the future, was a *merchantable* crop of tobacco. This was what the vendor agreed to sell and the vendee to purchase. It was the

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sale of a particular thing, by its proper description *merely*; and the descriptive words used for defining the thing to be sold, were of the substance of the contract, not collateral to the main object of it. * * * In an executory contract for the sale of personal property, the law implies that the article, when furnished, shall be of merchantable quality, and if the tobacco, when delivered, was not well cured and in good condition, but was wet, sweaty and rotten, it was not merchantable. In legal effect, therefore, the agreement as to which the breach was alleged, was the same as the law would imply in the absence of words of express contract. It would be established upon proof of a contract to sell and deliver the tobacco at a future time, and without proof of express words between the parties; and if express words were used, between the parties, yet superadding to the terms of a contract words expressing an obligation which the law implies does not change the nature or extent of the obligation, or the remedy upon it. A warranty, then, cannot be predicated upon the contract alleged in the complaint, and the rules of law by which the rights of the parties, in respect to warranties, are regulated, are inapplicable. A breach of the contract was not a breach of warranty, but a mere non-compliance with the contract that the defendant had agreed to fulfill." HOGEBROOM, J., delivering the opinion of the minority of the court, held that the complaint alleged an express warranty, and that conceding that the merchantable quality of the article is implied in every executory contract for the sale of personal property, it "would not obliterate the distinction between the effect of an express warranty, and that of a mere legal presumption as to the condition or description of the article." He defines an express warranty as "something more than a mere description of the article; it is a guarantee of what shall be its future condition at the time of delivery. It is something independent of, and not indispensable to, the

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mere act of sale and delivery, and is not merged in the latter." The case of *Hargous v. Stone*, (1 *Seld.* 73,) was an executory contract. A vendee desired to purchase cotton cloth to be imported into Mexico. By the revenue laws of Mexico the importation of cotton cloths of a less fineness than over 30 threads to the quarter square inch, was prohibited. As in the case at bar, several samples were exhibited and the goods ordered according to the sample selected, as in the case at bar. It did not appear that the vendor had notice that the goods were procured for the Mexican market, or that he was informed as to the revenue laws of that country. The goods were delivered at a packing house, where they were opened and re-packed, under the direction of the plaintiff. The goods were sent to Mexico, and there being found to be of the fineness of only 28 and 29 threads to the quarter square inch, they were condemned and forfeited by the custom house authorities. The action was similar to that in *Reed v. Randall*, alleging a warranty. The fact that the sale was by sample, was relied on as raising a warranty. But the court held that there was no warranty. That the implied warranty in case of a sale by sample, is confined to cases where the purchaser has no opportunity to inspect the goods, and that something beyond the mere exhibition of the sample, is requisite to create a warranty, "that the bulk of the goods is of the same quality as the sample, and that such an exhibition is but a representation that the sample has been fairly taken from the bulk of the commodity." Paige, J., delivering the opinion of the court, says: "Executory contracts of sale do not depend upon the same principles as executed contracts of sale. The doctrine of *implied warranty* has properly no application to the former. Where a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has, at the time, an article of the kind on hand, or it is afterwards to be procured or

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manufactured, the contract carries with it an obligation that the article shall be merchantable, at least of medium quality or goodness. If it comes short of this, the vendee may rescind the contract, and return the article after he has had a reasonable time to inspect it. He is not bound to receive or pay for it, because it is not the thing he agreed to purchase. But if the article is, at the time of the sale, in existence and defined, and is specifically sold, and the title passes *in presenti*, the transaction amounts to an executed sale, and although there is no opportunity for inspection, there will be no implied warranty that the article is merchantable. 1. When the sale is executory, if the goods purchased are found, on examination, to be unsound or not according to the order given for them, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. * * * Stone was guilty of no fraud or false representation, and he made no express warranty of any kind. My opinion is, and such is the opinion of the court, that the plaintiff made out no cause of action, and that he was properly nonsuited."

It is unnecessary to refer to the various cases cited from the English reports, and the previous cases in this country, since these two cases of *Hargous v. Stone*, and *Reed v. Randall*, are supposed to embody the law on this subject, as at present settled in this State and intended to be administered by the courts. The quotations have been made from the opinions in those cases, that it may be seen, at a glance, precisely what was intended to be decided in those cases. How far the court intended to apply the doctrine of *caveat emptor* and where they intended to stop.

It is obvious that there are many cases where the right to reject an article delivered under an order or upon an executory contract, will afford but an incomplete remedy.

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The case at bar affords an illustration. The plaintiffs had on hand a large quantity of grape juice, which they were desirous of converting into wine. To do this it was necessary that syrup should be added to it at a certain stage of the natural fermentation, and if this were omitted at the proper time great damage would ensue. The plaintiffs had made a contract with the defendants for the purchase of this syrup, and it was important that it should be used at once. The probability was, that any delay would be attended with danger of great damage. Syrup of an inferior quality to that bargained for, would to some extent answer the purpose, but its use was greatly less profitable, for the reasons explained by the testimony. The interests of the plaintiffs would strongly impel them to use the syrup on its arrival, though of inferior quality and much less valuable than such as they had ordered, but if they do use it, they cannot afterwards complain that it is not of the quality and description which they ordered.

How then are the plaintiffs to protect themselves against the inconvenience and embarrassment of such a position? Cannot the parties contract against such a consequence? Most assuredly they can. The contract is lawful. It violates no requirements of public policy. The parties are competent to make such a contract. How then is such a contract to be made? We answer, upon the authority of *Hargous v. Stone* and *Reed v. Randall*, by the vendee, at the time of the agreement to purchase, taking an *express* warranty that the goods, when delivered, shall possess the particular qualities which it is important to him to secure. Can it be supposed, after a careful perusal of the opinions delivered in *Hargous v. Stone*, and *Reed v. Randall*, that the court meant to hold that a party could not by express contract relieve himself from the obligation to return the property, and still hold the vendor responsible for the deficiency in quality? It seems to us not.

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As we understand those decisions, they expressly recognize the right of the vendee to protect himself against the contingency of being obliged to use, at his own risk and loss, an inferior article, or to be deprived of it altogether, when to attempt to supply its place might be attended with great inconvenience and loss, and that the mode of effecting this object is by exacting an express warranty, and that in such case the doctrine of warranty applies at the option of the vendee, to the same extent as if it were an executed sale, in which latter case it is well settled that the vendee is under no obligation to return the thing warranted, on ascertaining that it does not fulfill the warranty, but may keep it and rely on his warranty for redress.

In this case there was no implied warranty of merchantable quality broken. The syrup was merchantable, and was indeed of a quality often used even by the plaintiffs themselves.

Its delivery would have been in compliance with a contract to sell and purchase syrup, but it did not comply with the express warranty, if there were one, which was a contract collateral to the sale of the goods, and not merged in it.

It now becomes proper to advert to two other cases in the court of last resort, decided since the case of *Reed v. Randall*. The first is the case of *Foot v. Bentley*, (44 N. Y. 166,) decided by the Commission of Appeals. It appeared, in that case, that the plaintiffs gave the defendant's traveling agent an order for teas, according to a sample exhibited by the agent at the time. The agent said he did not know how many packages of that kind of tea the plaintiffs had at the time, but supposed they had from ten to seventeen packages in all, and the agent warranted the tea in the packages to be better than the sample. The plaintiff agreed to purchase it at a certain price, and it was agreed

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that the tea should remain on store in New York until the plaintiff should order it shipped to him at Rome, in Oneida county.

The contract was verbal, and nothing was paid at the time, and no delivery or change of possession took place until the tea was finally shipped upon the order of the plaintiff.

At different times after the contract the plaintiff sent the defendant his notes for the purchase money. And finally, about the 20th of April, pursuant to the order of the plaintiff, the tea was shipped to and received by him at Rome. The plaintiff kept the tea till June before making any attempt to discover whether it was like the sample, without returning or offering to return it, and discovering it to be of an inferior quality, brought the action upon the warranty. The point was taken by the defendant, that the plaintiff should have examined the tea, and if it did not correspond with the sample, should have returned it; and the case of *Reed v. Randall* was relied on. But the commission held the plaintiff entitled to recover, and upon this point Gray, C., says: It was also objected that because the plaintiff did not, at the earliest practicable time, after the tea was received in store, examine it, and, on account of its being of less value than the sample, offer to return it, he ought not to recover; and in support of that position the case of *Reed v. Randall* was cited. The facts in that case did not, as the court decided, constitute a warranty, and it was disposed of on that ground. In this case, the warranty is found as a fact. No obligation, therefore, existed requiring the plaintiff to return or offer to return the property warranted." It will be noticed that although it might be claimed, perhaps, that the sale of the tea was an executed sale, yet Commissioner Gray does not hold it to be such, or suggest that question as one of any importance, but understands the

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case of *Reed v. Randall* as holding that there may be an express warranty, with the ordinary obligations created by a warranty, whether the sale be executed or executory.

In the same case Commissioner Earl delivered an opinion, arriving at the same result. He, however, does not meet the question, whether there is any difference, as to this question, between a sale executory and one executed. His opinion is to the effect that, as there was no compliance with the statute of frauds, the sale became valid and was consummated on the delivery of the tea, and says: "This, then, must be treated as an executed sale with warranty, and the plaintiff was entitled to recover without any offer to return the tea for any breach of warranty." Now, in the case at bar, there was no compliance with the statute of frauds, and, according to the opinion of Commissioner Earl, the sale became valid and executed as to the various parcels of syrup when they were respectively delivered, and the warranty then attached. Upon the ground taken by either commissioner, in *Foot v. Bentley*, the nonsuit in this case was erroneous, if there was an express warranty as to the quality of the syrup.

In *McCormick v. Sarson*, (45 N. Y. 265,) decided by the Court of Appeals, the defendant agreed to purchase certain lumber in the plaintiff's mill-yard, consisting of three kinds, respectively denominated prime, merchantable and refuse, at specified prices for each kind. The lumber was thereafter to be measured and delivered. The defendant received the lumber, and gave receipts for a certain quantity as prime, and a certain other quantity as merchantable. In an action by the vendor to recover the purchase price of the lumber, on the trial, the defendant offered to show that the lumber receipted for as prime and merchantable was not such, but was in fact of an inferior quality. The majority of the court held that the defendant could not contradict the receipts. Peckham, J., deliv-

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ering the opinion of the majority, and referring, among other cases, to *Reed v. Randall* and *Hargous v. Stone*, says: "If he accept it after examination, or after an opportunity for examination, as fulfilling the contract, he is bound by such election. This rule is well settled. This is the rule, in the absence of any fraud or warranty. No fraud or warranty was claimed, or offered to be proved in this case."

We see, therefore, that the Court of Appeals appears to understand the rule as laid down by that court in *Hargous v. Stone*, and *Reed v. Randall*, as not embracing cases where there is an express warranty. And the Commission of Appeals not only so understands these cases, but seems to have expressly held that under a contract like that in the case at bar, if there be a warranty, the plaintiff can recover notwithstanding he has given no notice, and neither returned nor offered to return the goods delivered.

In *Neaffie v. Hart*, (4 *Lans.* 4,) decided in this department, there was no express warranty pretended.

This brings us to the question, whether there was any evidence tending to show, and if any what, express warranty in this case. The testimony of the plaintiff Ryckman, who made the bargain, is: "I told him that in some syrups I had seen, sugar would fall down, and some would crystallize to candy. He says: "Mr. Ryckman, our syrup will not crystallize, or sugar fall down; I warrant our syrup all right." Here was an express warranty *ex vi termini* of something. What was it that was warranted? Taken as a reply to the observation of Ryckman, and in connection with the evidence that the purchase was of rock candy syrup, that it was so billed to the plaintiffs, and that rock candy syrup will not crystallize, or the sugar fall down, we think the testimony, by reasonable interpretation, tended to show an express warranty that the syrup to be delivered under the contract should be rock

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candy syrup, or at least, syrup which would not crystallize, or deposit the sugar.

The interpretation of this conversation, and what particular warranty was intended, was, we think, in this case, a question for the jury. The idea that both parties supposed they were acting under an express warranty on this subject, is strengthened by the correspondence. On the receipt of the second lot of syrup the plaintiffs wrote: "We opened one barrel and find that this syrup crystallizes, but it looks well, and shall soon open on it right smart. If it is all right, then we shall have no trouble, but looks like sugar syrup. If so, it is all well." In reply to this letter the defendants say: "You need have no fears that we will not do the square thing in all our transactions with you."

Here the defendants were notified that the plaintiffs had some doubts whether the sugar was such as had been bargained for, and had some suspicions it was not, but were inclined to risk using it. Instead of cautioning the plaintiffs against using the sugar if it was not of the quality ordered, or offering to take it back, the defendants reply to the plaintiffs' suggestions in a way calculated to induce them to go on and use the syrup, and to lead them to repose upon the idea that they, the defendants, would make the matter right. If the defendants were not absolutely called upon to caution the plaintiffs against using the sugar, on receiving this notification, if they intended to insist that by using it the plaintiffs would waive all claim against the defendants, for any deficiency of quality, certainly fair dealing would not permit them to lull the plaintiffs into security by suggesting, in ever so vague a manner, that the defendants would make a fair deduction if the quality of the syrup was not up to the contract. We think there was no warranty as to the time of delivery, which survived the acceptance and use of the syrup;

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and that the plaintiffs cannot recover upon the allegation that the syrup was not forwarded as early as was agreed.

The judgment must be reversed and a new trial ordered; costs to abide the event.

JOHNSON, P. J., concurred.

BARKER, J., dissented.

New trial granted.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Johnson, Talcott and Barker. Justices.]

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One who enters into possession of premises as the tenant of another, under a lease rendering rent, cannot, while that possession continues, dispute the title of his landlord.

And if, during such possession, the tenant takes a contract for the purchase of the land—which is equally an acknowledgment of the title of his landlord—and being unable to perform, surrenders it, and agrees to resume his footing as a tenant, no adverse possession can commence while that possession continues, as against the landlord, or his heirs.

This rule of law applies not only to the tenant himself, but to everyone who succeeds to his possession by his permission and consent.

The lessor or vendor of land would lose the protection of this rule of property if the tenant or vendee could make a fraudulent title to a third person, let him into possession, and then such third person should be permitted to claim adversely under the fraudulent title thus created by the tenant in possession, and who could not himself be permitted to set up even a valid title, without first restoring the possession. *Per TALCOTT, J.*

The possession of an assignee of the tenant cannot be adverse; and such possession cannot, by any mere lapse of time, ripen into a title, as against the landlord, or those claiming under him.

The administrators of a deceased landlord, cannot, by any act or omission of theirs, whether done innocently or otherwise, affect the title of one claiming under their intestate. And their unauthorized receipt of money upon a contract of their intestate, never valid and long since abandoned, will not change the position of the assignee of a tenant with regard to the true owner, or turn his possession as tenant into an adverse possession.

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A PPEAL from a judgment for the defendant, entered on the report of a referee.

Lansing & Sherman, for the appellant.

I. To constitute adverse title, the party must be in possession, claiming title hostile to the real owner. (*Code*, § 82.) In *Brandt v. Ogden*, (1 *John*. 156, 158,) Spencer, J., says: "In order to bar the recovery of a plaintiff who has title, by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under a claim hostile to the real owner, but that such hostility has existed on the part of succeeding tenants." In *Humbert v. Trinity Church*, (24 *Wend*. 587,) Cowen, J., at page 597, says: "A naked possession of land, unaccompanied by a claim of right, never constitutes a bar, but enures to the benefit of the owners. A possession, to be adverse, must be inconsistent with the title of the complainant who is out of possession; it must be accompanied with a claim of title, exclusive of the right of all others; and must be definite, notorious, and continued for the period of twenty years." In this case, the defendant or his lessor never claimed title; on the contrary, always claimed he was in under a contract of purchase, and was in pursuit of a title, which he on all occasions conceded he did not have, but was endeavoring to obtain.

II. A purchaser cannot dispute the title of his vendor; and while in possession under a contract of sale, such possession is the possession of the vendor, and as purchaser he cannot question the vendor's title. (*Jackson v. Smith*, 7 *Cowen*, 717; *Sutherland, J.*, 720. *Jackson v. Walker, Id.* 637; *Woodworth, J.*, 642, 643. *Jackson v. Spear*, 7 *Wend*. 401; *Nelson, J.*, 404. *Ingraham v. Baldwin*, 9 *N. Y.* 45; *Gardiner, J.*, 47. 2 *Phil. Ev.* 276, 2d ed. *Cowen & Hill's Notes*, 201, and cases cited.)

III. The plaintiff was in possession of these premises

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under a contract for the purchase thereof from George M. Hopkinson, the defendant's lessor, when he received the conveyance of the same from Hiram W. Kilborn, September 27, 1865. He could not interpose such conveyance as a defence in the action of ejectment brought against him by Hopkinson. He must first surrender the premises and bring his action. This he has done. (*Jackson v. Spears*, 7 Wend. 401.) This principle disposes of the judgment as a defence in this action.

IV. The defendant, or his lessor, cannot claim to hold these premises, upon the principle that a purchaser may do so after performance, and an equitable title to a deed has been acquired. When the conveyance of these premises was made by the heirs of Allen Kilborn to Hiram W. Kilborn, Samuel H. Stearns was in the possession, as the tenant of Allen Kilborn. The contract under which the defendant claims was never executed by Allen Kilborn, or by his authority. He totally repudiated it, when first brought to his knowledge. It was cancelled and surrendered up by both parties; and it was never subsequently recognized by the heirs of Allen Kilborn, or by Hiram W., as having any legal or equitable existence. Immediately thereafter, in April, 1841, a new contract was made. On the 3d of July, 1841, this new contract was cancelled, and the premises leased by Allen Kilborn to Stearns, under which he occupied when Hiram W. became the owner in April, 1842, and when Hopkinson went into possession in September, 1842. The assignment of the Sherwood contract to Hopkinson, gave no force or effect to it. The administrators, by receiving payment upon it, could not give life or validity to a contract which their intestate had never executed or authorized, but had expressly repudiated. At the time of such payment Hiram W. was the owner of the premises; he had never consented to or sanctioned such payment. At the time of the alleged transfer to Hopkinson by Stearns, and at the time of the alleged payment to

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the administrators, this contract had become forfeit. The payment due April 1, 1842, had not been made. This alone was sufficient to put him upon inquiry. Hence every element necessary to constitute the purchaser a holder adversely, is wanting in this case. 1. There is no contract for the purchase. 2. There is no performance of any such contract. 3. There is no equitable title to a deed of the premises acquired. No adverse possession in this case can be based upon any paid up contract, entitling the party in equity to a conveyance.

V. There is a wide difference in principle in claiming under a defective deed and under a defective contract. 1. Under a deed or any writing purporting to transmit or vest the title—such title is absolutely claimed—and such claim is the very gist of an adverse possession. Such claim without a paper title may constitute an adverse possession. 2. Under a contract the purchaser does not claim the title. He expects, on performance of his contract, to receive, sometime in the future, a title to the premises; and it must be such a contract that upon the performance of it the purchaser can, in equity, compel a conveyance to him by the vendor or his representatives. (*La Frombois v. Jackson*, 8 Cowen, 589. *Briggs v. Prosser*, 14 Wend. 228.) And in no case has it been held that a contract performed, and upon which a conveyance cannot be enforced, constitutes the basis of an adverse title.

VI. The referee in this case finds that there was no valid contract of sale. That there is no contract executed by Allen Kilborn, or by his authority, or ratified by him, or those claiming through him. That there is no performance, as payment to the administrators, under those circumstances, is wholly unauthorized. Yet, upon a contract made by an assumed agent, which was repudiated and surrendered up by both parties, and the agent's authority denied, the referee holds an adverse title can be based.

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M. A. Hackley, for the respondent.

I. The plaintiff is not entitled to recover the premises in question, if such premises have been held and possessed adversely to the plaintiff's title, by the defendant's lessor for twenty years before the commencement of this action. (*N. Y. Code*, §§ 78-81.) 1. George M. Hopkinson was the defendant's lessor. He was in the actual continued occupation of the premises in question, and in the uninterrupted possession thereof from the 30th day of March, 1843. to the 14th day of December, 1867, a period of twenty-four years and eight months. 2. He paid for said premises in full, and in good faith, on or before the 30th of March, 1843. 3. He in good faith claimed to be the owner of said premises from that date. He believed his contract a valid one, and claimed that he was entitled to a deed. He claimed in hostility to the title of the plaintiff, and exclusion of any other right.

II. Possession under a paid up contract is a good basis for an adverse possession. (*Briggs v. Prosser*, 14 *Wend.* 228. *Jackson v. Foster*, 12 *John.* 488. *Fosgate v. Herkimer Manuf. &c. Co.*, 12 *Barb.* 352. *La Frombois v. Jackson*, 8 *Cowen*, 589. *Clapp v. Bromagham*, 9 *id.* 530.)

III. It is not necessary that the instrument claimed under should be a valid one. The fact of possession and its character are the test. (*La Frombois v. Jackson*, 8 *Cowen*, 589. *Munro v. Merchant*, 28 *N. Y.* 9-41. *Bradstreet v. Clarke*, 12 *Wend.* 602. *Humbert v. Trinity Church*, 24 *id.* 587.)

IV. Possession of a lot under claim of ownership is a good adverse possession. (*Crary v. Goodman*, 22 *N. Y.* 171. *Müller v. Garlock*, 8 *Barb.* 153. *Humbert v. Trinity Church*, 24 *Wend.* 587.)

V. The defendant's lessor having possessed the premises in question adversely to the plaintiff and his grantees, for more than twenty years, is the true owner of said premises. (*Traphagen v. Traphagen*, 40 *Barb.* 537. 24 *Wend.* 587. 4 *Duer*, 452. 8 *Cowen*, 589.)

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By the Court, TALCOTT, J. This is an action of ejectment, to recover the possession of a lot in Ellis village, in the county of Jefferson.

According to the findings of the referee, Allen Kilborn was the owner of the premises in fee, on and prior to April 1, 1841. On that day one Sherwood, assuming to act as the agent of Allen Kilborn, entered into a written agreement for the sale of the premises to Samuel H. Stearns. Stearns being then in the possession of the premises under a lease from Allen Kilborn. The bargain made by Sherwood was for a sale of the property for \$250, but he received a note from Stearns for \$50 in payment of part of the purchase money, and the sum secured by the contract to be paid was only \$200. Sherwood sent the contract and note to Allen Kilborn. Sherwood had no authority to enter into the contract as the agent of Kilborn, and the latter refused to accede to it, but prepared and executed another contract to sell the same premises to Stearns, bearing the same date as the Sherwood contract, but providing for the payment of \$250 as the condition on which a conveyance was to be made. By this latter contract the sum of \$50, part of the purchase money, was to be paid by Stearns on the 1st day of July, 1841, and Allen Kilborn caused the Sherwood contract and the \$50 note to be returned to Stearns. They were delivered back to him, and the new contract, executed by Allen Kilborn personally, was, by agreement of the parties, substituted in place of the Sherwood contract. On the 2d of July, 1841, Allen Kilborn assigned the last contract to his son, Hiram W. Kilborn, and authorized him to settle with Stearns. On the next day Hiram W. Kilborn applied to Stearns for the payment of the \$50 which became due on the first of the same month. Stearns could not pay, and thereupon surrendered the contract and agreed thereafter to occupy the premises as a tenant. The particular terms of the tenancy are not found by the referee. The agreement, as

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testified to, was that Stearns was to pay Hiram W. Kilborn rent for the premises as long as he (Stearns) occupied them. The lease under which Stearns was occupying when the contract was made, was a lease for a year, at the annual rent of \$36.

Allen Kilborn died intestate in August, 1841. In the summer or fall of 1842, the said Samuel Stearns, being still in possession of the premises, undertook to, and did, for a valuable consideration assign to one George M. Hopkinson, the old contract attempted to be made by Sherwood as the agent of Allen Kilborn with Stearns, falsely representing it to be a valid contract, and that he had paid \$50 down at the time of taking it; and thereupon he surrendered the possession of the premises to Hopkinson, who purchased the contract for a valuable consideration, believing the same to be a valid and outstanding contract, and went into possession of the premises under that supposition. Hopkinson afterwards paid to the administrators of Allen Kilborn the amount purporting to be secured to be paid as the purchase money of the premises under the Sherwood contract, supposing, as the referee finds, that they had a right to receive the same, and they did receive it. Hiram W. Kilborn was the son, and one of the heirs at law of Allen Kilborn, and in 1841 and 1842, he acquired, by conveyance, the title and interest of his co-heirs to the premises. This was before the payment by Hopkinson to the administrators of Allen Kilborn, of the sum purporting to be due on the Sherwood contract. Hopkinson and those claiming under him, have been in the occupation of the premises since he received the possession with the assignment of the Sherwood contract from Samuel Stearns. And since he made the last payment on the Sherwood contract to the administrators, which was in March, 1843, Hopkinson has claimed to own the same under the Sherwood contract. In 1858 the plaintiff went into possession of the premises, under a verbal contract with Hopkinson

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to purchase the same of him. In 1865, and whilst the plaintiff was so in possession under the verbal contract with Hopkinson, he (the plaintiff) took a deed of the premises from Hiram W. Kilborn. Many and various negotiations had taken place between Hopkinson and Kilborn before this time, touching some compromise, or settlement, of the disputed title, each claiming in hostility to the other.

Much evidence was given on the part of the defence, tending to show that Hiram W. Kilborn had, after Hopkinson's purchase of the Sherwood contract from Stearns, recognized the validity thereof, and consented to the payment of the money purporting to be due thereon to the administrators, by way of raising an estoppel against Hiram W. Kilborn.

This was contradicted, and the referee finds that no facts were sufficiently proved to establish such an estoppel. When Hopkinson discovered that the now plaintiff, then in the possession of the premises as his vendee, had taken the conveyance from Hiram W. Kilborn, he commenced an action of ejectment against the present plaintiff. On the trial of that action the now plaintiff was not permitted to set up his title under the deed from Hiram W. Kilborn, upon the ground that he had entered into the possession under the contract with Hopkinson, and could not set up a hostile title existing at the time of his taking possession, until he had first restored the possession. (*Jackson v. Spear*, 7 Wend. 401.)

The present defendant is the tenant of Hopkinson. The referee has determined, as a conclusion of law, that the possession of Hopkinson, from the time he paid to the administrators the amount purporting to be secured by the Sherwood contract, was hostile and adversé to the title of Hiram W. Kilborn; and therefore that the defendant and those under whom he claims, have held the premises adversely for more than twenty years, and upon this

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ground, has rendered judgment for the defendant. In this we think the referee has overlooked an important principle of law, namely, the one which was illustrated in the action of Hopkinson against the now plaintiff, and which the referee, in discussing the effect of that judgment, seems to fully recognize and understand. The plaintiff represents, and is vested with the title which Allen Kilborn formerly had, and to which Hiram W. Kilborn succeeded. It would not be seriously pretended that if Stearns were now in possession of the premises he could deny the title which the plaintiff represents. He entered into the possession of the premises as the tenant of Allen Kilborn, under a lease rendering rent, and could not, while that possession was continued, dispute the title of his landlord. During such possession, he took a contract for the purchase of the land, which was equally an acknowledgment of the title of Kilborn. This contract was never performed, but Stearns, being unable to perform it, surrendered it, and agreed to resume his footing as a tenant. Under these circumstances no adverse possession could commence while that possession continued, as against Allen Kilborn or his heirs. So far the referee recognizes the doctrine, but he seems to have overlooked the fact that this rule of law applies not only to the tenant himself, but to everyone who succeeds to his possession by his permission and consent. This doctrine is distinctly recognized in *Jackson v. Spear*, (*supra*,) and has been expressly decided in several cases. *Jackson v. Walker*, 7 Cowen, 637. *Jackson v. Harder*, 4 John. 202.)

The lessor, or vendor, of land would lose the protection of this rule of property, if the tenant or vendee could make a fraudulent title to a third person, let him into possession and then such third person should be permitted to claim adversely under the fraudulent title thus created by the tenant in possession, and who could not himself be permitted to set up even a valid title, without first restor-

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ing the possession. The title claimed by Hopkinson was a title fraudulently created by the tenant of Kilborn, and Hopkinson was let into possession by, and succeeded to the possession of, the tenant. "A claim of title which cannot be set up by a person while in possession, cannot be set up by another who comes into possession under him." (*Jackson v. Harder, supra.*) As assignee of Samuel Stearns the possession of Hopkinson could not be adverse; and that possession could by no mere lapse of time ripen into a title as against the landlord, or those claiming under him. The administrators could not, of course, by any act or omission of theirs, whether done innocently or otherwise, affect the title of Hiram W. Kilborn, and their unauthorized receipt of the money, on the never valid, and long abandoned, Sherwood contract, did not change the position of Hopkinson with regard to the true owner, or turn his possession as tenant of Kilborn into an adverse possession.

The judgment must be reversed and a new trial ordered, costs to abide the event, and the order of reference vacated.

MULLIN, P. J., having formerly been of counsel in regard to the matters involved, did not sit in the case.

New trial granted.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872, Johnson and Talcott, Justices.]

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THE PEOPLE, *ex rel.* Arnold Gregory, and Arnold Gregory
vs. OZRO LOVE.

Since the decision of *The People v. Saxton*, (22 Wend. 309,) and *The People v. Cook*, (8 N. Y. 68,) it has been considered settled that on the trial of a *quo warranto*, where the question as to who was elected to a particular office, and what was the intention of certain ballots, is investigated before a jury, the court and jury are not confined to the narrow limits which control the boards of canvassers, who have no power to take evidence *aliunde* the ballot itself, for the purpose of elucidating any apparent ambiguity on its face, or any apparent incongruity between it and the surrounding circumstances.
Per TALCOTT, J.

The placing, upon a ballot, of a "paster" containing one name, over another name, indicates an intention to substitute one name for another. If it be placed over another name which is under the title of an office, it indicates an intention to substitute for that office the name upon the paster. If it be done in such a manner as to afford any ground for doubt whether the voter intended to designate two persons for the same office, that doubt may be safely left to be solved by a jury, in view of all the facts, the appearance of the ballot, and the surrounding circumstances.

At an election for town officers, printed ballots were used, headed, "For supervisor, Ozro Love." Next below, was, "For town clerk, John A. Raymond." Upon the canvass of the votes, twenty-six ballots were found, having upon each of them a "paster," or slip of paper, with the name of the relator printed thereon, pasted under the heading "For supervisor," so as to cover the name of Ozro Love. And some of them wholly covered, and others partly covered, the words "For town clerk," next below the name of Ozro Love; so that, in cases where the whole of the words "For town clerk" were covered by the "paster," the ballot, with such paster, purported to be, "For supervisor, Ozro Love, John A. Raymond." The board of canvassers refused to allow either the relator or Love any of the ballots on which the relator's name was pasted, and where the paster covered the whole or any part of the words, "For town clerk," on the ground that they designated the names of two persons, viz., the relator and John A. Raymond, for the office of supervisor; and their decision was sustained by the judge at the circuit.

Held, 1. That the judge, at the circuit, erred in holding, as matter of law, that the rejected ballots could not be allowed to the relator.

2. That the facts should have been submitted to the jury, for them to determine whether the ballots in question designated two names for the same office, or were only intended to substitute the name of the relator for that of the defendant, for the office of supervisor.

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EXCEPTIONS taken on a trial at the Orleans circuit and ordered to be heard at the general term, in the first instance.

John H. White, for the relator.

I. The court erred in deciding that the six votes with pasters could not be counted for Gregory, and in refusing to submit to the jury the question as to the whole twenty-six; in deciding that Love was elected; and in dismissing the complaint. 1. "The rules for conducting elections, contained in the statutes, are intended to afford all citizens an opportunity to exercise their right to vote; to prevent illegal votes, and to ascertain, with certainty, the true number of votes cast, and for whom. These are directory and not jurisdictional in their character." (*The People v. Cook*, 8 N. Y. 68, 86.) 2. "The Supreme Court has power to go behind the certificate of the canvassers and the ballot box, to ascertain the intention of the voters in depositing their ballots, and to correct errors made by them." (*Id.* 67-83.) Since the decision of the Cook case, it has been considered as the settled law that the only question is, what was the intention of the voter in casting the ballot—to be ascertained like any other fact—not by his swearing to his intention, but by his acts and the surrounding circumstances. The mere statement of the proposition (to any person accustomed to the practice of political parties in their nominations, and to the manner of conducting our elections,) that two tickets were in nomination at a given election, and printed and circulated; that there were the names of the two nominees for the same office of supervisor printed on the tickets, and immediately below them, on the respective tickets, the names of two other nominees for the other office, of town clerk; that the several persons in nomination resorted to the usual mode of pasters to secure votes for themselves from the other party, and that twenty-six of the pasters of

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one of the candidates were pasted over the name of the opposing candidate, and in so doing, the paster covered, in some cases, a portion of the title to the office below, and in others the whole of that title; shows conclusively the intention of the voter to vote for the man whose name he pasted, as against the name pasted over, and rebuts any idea that he designed to vote for two names for the same office, or to vote against the nominee for town clerk, though the title to that office was covered by the paster. No one can doubt but in all of those cases the voter intended to vote for Arnold Gregory for supervisor, and for John A. Raymond for town clerk, and the question is, whether this court will allow this plainly expressed intention to be defeated by any technical rule of law, or whether, in accordance with the dictates of right, truth and justice, they will make haste to discover some rule or principle of law to right this acknowledged wrong. We submit, in all confidence, that the principles established in, or rather re-affirmed by the Cook case, enable the court to do this without violating any rule of law, technical or otherwise.

Statutory rules for the conducting of an election, as we have seen, are merely directory; and they are directory and directing only to the boards of canvassers, and not in any regard controlling, in the courts. The court goes behind the certificate, and behind the ballot box, to the voter, to ascertain by his acts, viewed in the light of the surrounding circumstances, what his intention was, for whom he intended to vote, and for what officers, and whether he intended to vote for but one man for the same office, or for two. Hence the rule, binding upon boards of canvassers, that when a ballot has upon it the names of two or more persons for the same office, when but one is to be elected, it is of no consequence in the courts, except as it declares a rule of evidence, that where two names appear upon the ballot in connection with the same office, it may be *prima facie* evidence that the voter in-

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tended to vote for two; but where, from other circumstances and acts, it is evident that this appearance is deceptive, and that the real intention was not thus to vote, the court will give effect to the real intention, as against the apparent intention. The one is the rule for canvassers, mere ministerial officers, the other for the courts, whose only aim is to ascertain the real facts of the case by the application of the ordinary rules of evidence.

The judge at the circuit decided the case upon the authority of *The People v. Seaman*, (5 Denio, 409.) In that case "it appeared that a ballot was found in the box which had on it the names of both the relator and the defendant, which was rejected by the canvassers. The defendant offered to show by a witness that an elector showed the ballot to him (the witness) with the name of the relator upon it, and requested the witness to alter it by substituting the name of the defendant; and that the witness did thereupon insert the defendant's name, but neglected to erase that of the relator. The judge excluded the evidence, and the defendant excepted." The court, says the judge, "properly rejected the proof which was offered in regard to the ballot which had upon it the names both of the relator and the defendant. The intention of the elector cannot be thus inquired into when it is opposed or hostile to the paper ballot which he had deposited in the box. We might, with the same propriety, permit it to be proved that he intended to vote for one man when his ballot was cast for another; a species of proof not to be tolerated." This is all there is in the case on that point, and the judge was undoubtedly right in rejecting the evidence; for although it was not in conflict with the ballot, it added nothing to the force of the evidence presented by the ballot itself. It is a familiar rule that where a printed blank—lease, contract, or what not—is filled up, and some sentence is inserted with a pen in conflict with some of the printed matter, the writing is to prevail over the print,

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as the highest evidence of the intention of the persons making the contract; and this principle has been applied to the case of a ballot, by the Court of Appeals, and it would seem that had the case in Denio been before that court they would have directed a verdict for the defendant in accordance with this familiar rule. In the case of *The People v. Saxton*, (22 N. Y. 309,) the names of the three candidates were Silas Saxton, Solomon S. Hommell and Cornelius Burhans. Two had Hommell's name printed on them, and the name Silas written at the beginning, and Saxton at the end of the printed name of Hommell, thus: Silas Solomon S. Hommell Saxton. On one of them the printed name was not erased at all; on the other the written name Silas laps over and upon the printed name Solomon. Upon another, the name Silas Saxton was written upon and over the printed letters of Hommell's name, which were not otherwise obliterated or defaced. Another had the name of Burhans printed upon the ticket, with the name Silas written before and Saxton after it, thus: Silas Cornelius Burhans Saxton. The inspectors rejected these ballots, on the ground that they contained two names for the office of county clerk, and it depended on these whether the defendant was elected or not. The judge charged that this decision was not conclusive, and it was for them to say whether the ballots designated two names for the office of county clerk, and the plaintiff excepted. The jury found for the defendant. The two opinions affirming the judgment are not reported, because the court unanimously put its judgment on this ground: "The intention of the voter is to be inferred, not from evidence given by him of the mental purpose with which he deposited his ballot, or his notions of the legal effect of what it contained or omitted, but by a reasonable construction of his acts. His writing a name upon a ballot in connection with the title of an office, is such a designation of the name for that office, as to satisfy

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the statute, although he omits to strike out a name printed upon it in connection with the same office. The writing is to prevail, as the highest evidence of his intention. The judge ought to have charged the jury, as a matter of law, that they were bound to find the facts accordingly, from the face of the ballot itself. The jury having found in accordance with what would have been a proper direction the verdict must stand."

In the case at bar, the judge thought this case not in conflict with the *The People v. Seaman*, but we are unable to view it in that light. He seemed to think that the court, in 22 N. Y., might have put some stress upon the idea that the middle name for a person was surplusage, and amounted to nothing, the name Silas being written before the name Saxton, after the other names with which it was in connection; but that idea is not advanced in the case at all, but on the contrary, the fact of two distinct names is recognized. He also seemed to assume, in order to make it parallel with this, that in the *Seaman* case the name of *Seaman* was written above that of *Eastman*, which was printed; but this supposition is not warranted by the facts in the case.

It would be a strange decision which should uphold the verdict of a jury that Silas Solomon S. Hommell Saxton was the same name as Silas Cornelius Burhans Saxton, and that they both were nothing more than Silas Saxton, pure and simple.

II. The exceptions in this case having been ordered to be heard, in the first instance, at the general term, the general term is required to give judgment. (*Code*, § 265. *Devoe v. Hackley*, 3 Rob. 679.) The defendant cannot avail himself of any of the evidence with reference to illegal votes, as the judge, in effect, ruled out all that evidence, and refused to submit the matter to the jury; and the defendant took no exceptions thereto, nor requested him to submit any question upon that evidence. Therefore, if

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the court hold that the judge was wrong in his rulings, and that as a matter of law (there being no conflict in the evidence,) the relator should have been allowed the twenty-six votes, and the four double votes, or enough of either or both to overcome the defendant's apparent majority of twenty-one votes, they should direct judgment for the plaintiffs.

Bullard & Glidden, for the defendant.

I. One of the ballots did not contain the name of the office to which the person was intended to be chosen, as required by the statute, and should have been rejected for that reason. (1 *R. S.* 344, § 4.)

II. The judge was right in rejecting the ballots with two names on them for the office of Supervisor. (*The People v. Loomis*, 8 *Wend.* 396. *The People v. Seaman*, 5 *Denio*, 409. 1 *R. S.* 133, § 12.) The case of the *People v. Saxton*, (22 *N. Y.* 309,) does not apply, because in that case there was written evidence of the intention of the voter. The court says: "His writing a name upon a ballot, in connection with the title of an office, is such a designation of the name for that office as to satisfy the statute, although he omits to strike out a name printed upon it in connection with the same office. The writing is to prevail, as the highest evidence of his intention." It was the case of the construction of an instrument containing conflicting written and printed matter, and the well settled rule was applied, that the writing must be adopted and the printing rejected. The ballot itself furnished conclusive evidence of what the voter meant. There was in reality but one name on it. In the present case, the ballots, as prepared and deposited by the voters, furnish no evidence whatever as to which person they designed to vote for. They intended to do just what they have done—to have the ballot read just as it does read. There is no evidence of fraud, mistake or inadvertence. Covering the words,

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"For Town Clerk," so they cannot be read, has the same legal effect as deliberately erasing them with a pen, or procuring ballots to be printed with the words omitted. *Parsons*, in his work on *Contracts*, (vol. 2, p. 6,) uses the following language: "The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law will permit. Words must not be forced away from their proper signification to one entirely different, although it might be obvious that the words, used through ignorance or inadvertence, expressed a very different meaning from that intended. For if the words employed were those intended to be used, but their actual meaning was totally different from that which the parties supposed and intended them to bear, still their actual meaning would, generally, if not always, be held to be their legal meaning." A voter's design to vote for a particular man is of no consequence unless he designates the person, in some unmistakeable manner, so that others can tell, not what he meant to do, but what he *did* do. Neither court nor canvassers should guess at a man's intention, and then correct and amend his ballot, so as to carry out such supposed intention.

III. Rejecting the four double ballots and the one without a caption, and allowing all the rest for Mr. Gregory, and he has four majority. This is more than overcome by the illegal votes proved to have been given for him. (*The People v. Pease*, 27 N. Y. 45.)

By the Court, TALCOTT, J. This is an action substituted by the Code in the place of the writ of *quo warranto*, and was instituted to try the respective titles of the relator and

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the defendant to the office of supervisor of the county of Orleans, for the town of Barre.

The defendant occupies the office, to which the relator claims that he, the relator, was duly elected, at the annual town meeting of the town in April last. Issue was joined between the parties, and the action went to trial at the Orleans circuit, where the court ordered the complaint to be dismissed.

The facts upon which the question arises are substantially as follows: At the town election referred to, there were two tickets for town officers put in nomination by the voters of the town; one denominated the Republican, the other, the People's ticket. The relator was the candidate for supervisor on the People's ticket; the defendant was the candidate for the same office on the Republican ticket. All the ballots that were voted were printed. The Republican ticket commenced, and was in form, as follows:

“For Supervisor,
Ozro Love.
For Town Clerk,
John A. Raymond.
For Justice of the Peace, (Full Term,)
LeRoy R. Sanford.
For Justice of the Peace, (Vacancy,)
Henry M. Gibson.”

And so on, proceeding and stating in the same manner, and in addition to the portion quoted above, the title of various other offices, viz., collector, commissioner of highways, overseer of the poor, assessor, constables, game constable, and inspectors of election for the three districts of the town. Under each of the titles was printed a single name, except in the cases of the constables and the inspectors of election, and under each of those the number of names requisite to fill the offices specified were printed.

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The "People's ticket" was in the same form, with a designation, however, of different names for the respective offices.

Upon the canvass of the votes, twenty-six ballots were found consisting of the regular "Republican ticket" with what is known as a "paster." These "pasters" are narrow slips of paper with a name printed thereon, the back of the slip of paper being covered with mucilage for the purpose of conveniently applying them to a regular ballot, over a name upon it, and thus substituting the name on the printed slip for some name on the regular ballot over which it is pasted. Each of the twenty-six votes above mentioned contained one of these slips having the name of Arnold Gregory, alone, printed upon it, and pasted over the name of Ozro Love. In other respects they were the regular ballot known as the "Republican ticket." The "pasters" were pasted under the head of the words "For Supervisor" at the head of the ticket, so as to cover the name of Ozro Love, and some of them wholly covered, and others partly covered the words "For Town Clerk," which was printed on the ballot below the name of Ozro Love, and above the name of John A. Raymond; so that in the cases where the whole of the words "For Town Clerk" were covered by the "paster," the vote with the "paster" purported to be as follows:

"For Supervisor,
Ozro Love.

John A. Raymond."

By holding the ballot up to the light the words "For Town Clerk" could be read through the paster, in the space between the names of Ozro Love and John A. Raymond. On one of the ballots which contained these "pasters," the paster nearly covered up the words "For Supervisor."

The board of town canvassers declined to allow either

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Love or Gregory any of the twenty-six ballots on which the name of "Arnold Gregory" was so pasted, and which covered the whole or any part of the words "For Town Clerk," upon the ground, as is conceded, that they designated the names of two persons, namely, Arnold Gregory and John A. Raymond for the office of Supervisor. This decision was sustained by the court, on the trial, as to all ballots where the paster covered the whole of the words "For Town Clerk." If these votes counted for the relator, he was elected to the office in question.

We think the judge at the circuit committed an error in holding as a matter of law, that the ballots rejected by him for the cause stated, could not be allowed to the relator. Since the decision of *The People v. Saxton*, (22 Wend. 309,) and *The People v. Cook*, (8 N. Y. 67,) it has been considered settled, that on the trial of a *quo warranto*, where the question as to who was elected to a particular office, and what was the intention of certain ballots, is investigated before a jury, the court and jury are not confined within the narrow limits which control the boards of canvassers, who have no power to take evidence *aliunde* the ballot itself, for the purpose of elucidating any apparent ambiguity on its face, or any apparent incongruity between it and the surrounding circumstances. It was expressly held, in *The People v. Saxton*, (*supra*,) that the decision of the inspectors of election rejecting a ballot as designating the names of two persons for a single office is not conclusive, but upon *quo warranto* the question as to the voter's intention is open to inquiry by the jury. And in that case it was held, where a name was written upon a printed ballot in connection with the title of an office, that the written name was to be counted for the party whose name was written, although a printed name for the same office, on the same ballot, was not erased. And this was held as a matter of law, upon the ground that where an instrument contains both writing

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and printing, and the two appear to be inconsistent, the written words afford the best evidence of the intention, and accordingly that in that case the writing of the name afforded conclusive evidence of the intention of the voter to cast the ballot for the name that was written, and that the omission to erase the printed name was accidental. The same principle, we think, applies to this case. The acts of the voter are to receive a reasonable construction, in view of the surrounding circumstances.

The placing of a paster containing one name, over another name, indicates an intention to substitute one name for another. If it be placed over another name which is under the title of an office, it indicates an intention to substitute for that office the name upon the "paster." If it be done in such a manner as to afford any ground for doubt, whether the voter intended to designate two persons for the same office, we think that doubt may be safely left to be solved by a jury, in view of all the facts, the appearance of the ballot and the surrounding circumstances.

In this case, we are of the opinion that the facts should have been submitted to the jury, for them to determine whether the pasted ballots in question designated two names for the same office, or were only intended to substitute the name of the relator for that of the defendant for the office of supervisor.

A new trial must be ordered, with costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 10, 1872.
Johnson, Barker and Talcott, Justices.]

63	547
59h	308
68	547
85h	101

WILDER and others vs. BOYNTON.

A counter-claim, as now used and understood, includes recoupment and set-off.

In an action for money paid, and for manufacturing ninety-six fire extinguishers for the defendant, at his request, amounting to \$1200, a balance of \$1076 being claimed as due, the answer, after setting up a general denial, alleged that in consideration of an agreement by the defendant that he would allow the plaintiffs the privilege of making and vending 100 fire extinguishers, of which the defendant was the patentee, the plaintiffs undertook and agreed to manufacture and sell the same, within a reasonable time, and from the proceeds to allow and pay the defendant one-third of the net proceeds of such sales; and that they wholly failed to keep their agreement; whereby the defendant sustained \$2500 damages. *Held* that the answer contained all the facts essential to a well stated counter-claim, and necessary to sustain it as such.

Where facts were stated, in an answer, as an avowed "second defence," and at the close of the statement of the defence, the answer contained these further words: "Which sum the defendant will recoup against any demand of the plaintiffs in this action;" *it was held* that there was no validity in the objection that the defendant could not avail himself of the fact, thus stated, except for the purpose of extinguishing the plaintiffs' demand. That under the provisions of the Code, the facts being stated which would be necessary to enable the defendant to give evidence of his defence, it would be the right, as well as the duty, of the court to give such judgment as he should establish, by proof, he was entitled to.

The right of a plaintiff to *discontinue* after an answer containing a counter-claim, and a partial trial, is a qualified one. The court has a right to control its own orders, and may exercise its discretion in respect to the terms upon which parties shall be permitted to discontinue actions.

The plaintiffs (who were non-residents) after voluntarily coming into court and submitting themselves to its jurisdiction, entered upon a trial; and when the defendant produced evidence which not only established that they had no cause of action, or at most, one upon which they were entitled to recover of the defendant a less sum than he was likely to recover of them, they asked for an interview, to negotiate a settlement, and for that purpose the referee suspended the trial. Failing in the negotiations for a settlement, they left the place where the trial was being had, and escaped from the State before the defendant was able to serve them with a summons to commence a second action. *Held* that the plaintiffs having, after occupying the time of the court, deliberately sought to avoid its jurisdiction, they could not, by an *ex parte* order, entered without the leave of the court, discontinue the action; and the same was set aside, on motion.

Wilder v. Boynton.

MOTION by the defendant to set aside an order entered by the plaintiffs, *ex parte*, discontinuing the action, after a partial trial before a referee, and after a portion of the defendant's evidence had been given, before the referee.

The plaintiffs are non-residents, and the affidavits read in support of the motion establish that the plaintiffs, after discovering that they might not recover, suddenly left the State, and evaded a service upon them by the defendant of process for a second suit.

The reference was had upon the stipulation of the respective parties, in open court, and an order in pursuance thereof duly entered.

Wm. J. Wallace, for the motion.

C. A. Hammond, opposed.

HARDIN, J. The complaint in this action alleges that the "defendant is indebted to them in the sum of \$1076 for money paid to and for said defendant, at his request, about October, 1871, and for manufacturing ninety-six fire extinguishers for the defendant, at his request, at \$12.50 each, \$1200, which several sums the defendant agreed to pay for as aforesaid." And it also contains a prayer for \$1076, balance after crediting the defendant with a payment of \$179. The answer contains a general denial, and then sets up that the defendant, in June, 1869, entered into an agreement with the plaintiffs whereby, in consideration of an agreement of the defendant that the defendant would allow the plaintiffs the privilege of making and vending 100 fire extinguishers, of which the defendant was the patentee, the plaintiffs undertook and agreed to manufacture and sell the same within a reasonable time, and from the proceeds would allow and pay the defendant one-third of the gross proceeds of such sales, and that the plaintiffs wholly failed to keep their agreement; whereby the defendant sustained \$2500 damages.

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The answer contains all the facts essential to a well stated counter-claim.

The facts are stated as an avowed "second defence." The answer, at the close of the statement of the defence, contains the further words, to wit, "which sum the defendant will recoup against any demand of the plaintiffs in this action." And it is now insisted that the defendant cannot avail himself of the facts thus stated, except for the purpose of extinguishing the plaintiffs' demand.

But, under the provisions of the Code, the facts being stated, which would be necessary to enable the defendant to give evidence of his defence, it would be the right as well as the duty of the court to give such judgment as the party should establish, by proof, he was entitled to. (*Code*, §§ 149, 150, 274.)

The answer "contains a statement of new matter constituting a counter-claim, in ordinary and concise language." It contains all that is necessary to sustain it as a statement of a counter-claim. (*Mattoon v. Baker*, 24 *How.* 329.) A "counter-claim" as now used and understood, includes recoupment and set-off. (*Clinton v. Eddy*, 1 *Lans.* 61. 3 *Hill*, 171.)

The right of a plaintiff to discontinue after an answer containing a counter-claim, and a partial trial, is a qualified one. The court has a right to control its own orders, and may exercise its discretion in respect to the terms upon which parties shall be permitted to discontinue actions.

The Code has, to some extent, changed the former practice.

This question has been passed upon in numerous cases, since the adoption of the Code. The most recent one reported is that of *Young v. Bush*, (36 *How. Pr.* 240.) It was held, in that case, at general term, that the right of a plaintiff to discontinue is not absolute, and that the right to discontinue may be disallowed, in the discretion

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of the court. The opinion of Justice SMITH, in that case, reviews the authorities, and states quite satisfactorily the rule which should prevail, in respect to discontinuances by the plaintiff. It remains only to apply that rule to this case.

The plaintiffs came voluntarily into this court, and submitted themselves to its jurisdiction, entered upon a trial, and when the defendant produced evidence (as the motion papers state) which not only established that they had no cause of action, or at most one upon which they were entitled to recover of the defendant a less sum than he was likely to recover of them, they ask for an interview, to negotiate a settlement, and for that purpose the referee suspends the trial, and failing in the negotiations for a settlement, they leave the city of Syracuse, where the trial is being had, and escape from the State before the defendant is able to serve them with a summons to commence a second action. They have come into this court, and occupied its time, and then they suddenly attempt to prevent the defendant from having a formal determination of the issues framed for that purpose. No affidavit was read in explanation of their conduct in respect to the trial. They stand therefore charged by the moving affidavits, to which no answer is given, with having *deliberately sought to avoid the jurisdiction of the court*; and after that attempt, they ask its order, in furtherance of their purpose, to absolve them from its judgment. The case therefore stands, in some sense, like the case where a discontinuance would enable the plaintiffs to interpose the statute of limitations, to a counter-claim, and should be treated accordingly.

It was said, by way of excuse, that the pleadings of the plaintiffs required amendment to enable them to present their claim properly to the court. But it must be borne in mind that the court possesses ample power to permit such amendment, and that furnishes no reason why the defendant should not have the trial concluded, which the

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plaintiffs, by their action, have compelled him to enter upon and pursue until it is two-thirds over.

The learned counsel for the plaintiffs, by way of exculpating the conduct of the plaintiffs, suggested to the court, upon the argument of this motion, that the contract out of which the litigation arose related to a *patent right*, and therefore could not be litigated in a State court. By a quite recent decision of the Court of Appeals, in this State, the contrary has been held, and therefore that excuse must be disregarded. (*Middlebrook v. Bloodbent*, 47 N. Y. —.)

The conclusion is reached that the plaintiffs have demeaned themselves in such a manner, in respect to this action, that it is but a reasonable exercise of the discretion of the court to require that they should permit the defendant to have the determination, by the referee, of the issue existing between them and the defendant, in respect to the matters referred to in the pleadings; and therefore the order entered *ex parte* must be set aside, and either party allowed to give the usual notice of trial, and proceed before the referee, as though no order of discontinuance had been entered. (36 How. 244.)

The plaintiffs will be at liberty to apply to the referee, or to the court, to amend their pleadings; and in that way the merits of the whole controversy may be fully considered and determined in this action.

The motion is granted, with \$10 costs.

[HERKIMER SPECIAL TERM, September 8, 1872. *Hardin*, Justice. Affirmed, at a GENERAL TERM in the FOURTH DEPARTMENT, held January 7, 1873. *Mullin*, *Talcott* and *E. Darwin Smith*, Justices.]

BURKE and others vs. CANDEE.

63 552
86h 47463 552
88h 348
63 552
92h 56
3ap 48

In an action brought for the purpose of having certain deeds of lands worth \$30,000, declared to be mortgages, and that the defendant held the title as trustee, the referee found against the plaintiffs, and reported that the deeds were absolute and vested the fee in the defendant, free of any trust or condition. On a motion by the defendant for an additional allowance:

Held, 1. That the case came within the provisions of section 309 of the Code, as it now stands amended.

2. That the basis of estimate was the value of the property directly affected by the judgment; that being the "subject matter involved."

An additional allowance is made by way of an *indemnity* to the party succeeding in the litigation.

The court must fix the amount to be allowed. Subject to the limitation in the statute, that the maximum shall not exceed five per cent "on the amount of the recovery or claim or subject matter involved," the sum will depend upon the proper deductions from the proofs submitted as to the indemnity needed for *actual expenses* in the action, necessarily or *reasonably* incurred beyond the taxable costs allowed by statute to the prevailing party.

Where the value of the property sought to be affected by the judgment was \$30,000, and the law of trusts and trustees was involved in and considered in connection with the evidence, at the hearing and upon the argument of the cause; the trial before the referee continued thirty days; a large number of witnesses were examined, and numerous pieces of documentary evidence and private writings were produced and examined; and besides the time so occupied before the referee, the counsel spent about the same number of days in preparing the cause for trial; and the fees of the referee were \$375; *Held* that this was a case both "extraordinary" and "difficult" in its features, within the section of the Code permitting a further allowance to be made to the prevailing party.

The case of *The Atlantic Dock Company v. Libby*, (45 N. Y. 499,) commented on and distinguished.

MOTION for an additional allowance, after a hearing before a referee and a report in favor of the defendant. The action was to declare deeds of lands worth \$30,000 to be mortgages, and that the defendant held the title as trustee, &c.

Geo. N. Kennedy, for the motion.

James Noxon, opposed.

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HARDIN, J. This action was brought to declare several deeds held by the defendant mortgages; and the referee has found against the plaintiffs, and that the deeds were absolute and vested the fee in the defendant, free of any trust or condition.

Had the plaintiffs succeeded, they might have asked a sale of the premises, and a payment to the defendant of the amount which should have been adjudged due the defendant, and that the balance of the proceeds be paid to the plaintiffs as owners of the equity of redemption. (*Horn v. Keteltas*, 46 N. Y. 605.)

The learned counsel for the plaintiffs insists that this was not an "action for the recovery of money," as the terms are used in the Code; and in that, he is correct.

The language of section 309, as it now stands, allows the "court, in its discretion, to make a further allowance upon the *amount of the recovery* or claim or *subject matter involved*." It has been held that the discretion conferred upon the court may be reviewed in general term, but not in the Court of Appeals, unless it appears to have been exercised upon an erroneous principle. (*The People v. N. Y. Central R. R. Co.*, 29 N. Y. 420. *Atlantic Dock Co. v. Libby*, 45 *id.* 499.)

In the last cited case, the action was to restrain the carrying on of a certain kind of business, and to recover \$1000 damages. The allowance in the court below was based upon *the value of the property affected* by the business sought to be restrained; and the chief judge, at page 504, states "there was nothing to show that they (the premises) are not as valuable for other purposes as for the business which has been carried on, and the *title of the defendants* is not *affected* or *impaired* by the judgment." The opinion is urged upon this court to show that this case comes within the rule there laid down. But that case is wholly unlike the one now before the court. The chief judge is careful to state that "*the title of the defendants* is not *affected*

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or impaired by the judgment;" and in that respect, the opinion furnishes some light upon the question involved in this motion. Manifestly the title to the lands described in the complaint in this action was *affected*, or sought to be *affected* by the litigation. It was the "*subject matter*" of the litigation, and had the plaintiffs succeeded, that title would have been moulded so as to stand as a security for any debt found due the defendant, and the balance would have been adjudged to belong to the plaintiffs. In short, the plaintiffs would have recovered the equity of redemption, and the decree would have provided that upon paying the amount found to be due, the plaintiffs were entitled to a conveyance. Or the premises would have been ordered sold, under the direction of the court, and the surplus, after paying the mortgage debt, paid over to the plaintiffs. The value of the property directly affected is the basis of the allowance. (*The People v. The Albany and Vermont R. R. Co.*, 16 Abb. 465. *Coleman v. Chauncey*, 7 Rob. 578.)

The plaintiff's counsel insists that this case was not "difficult and extraordinary." There is some conflict in the proof, upon that question. The defendant produces two affidavits, showing that the case before the referee was both difficult and extraordinary; that the same continued thirty days, and that a large number of witnesses were examined, and numerous pieces of documentary evidence and private writings were produced and examined; and that besides the time so occupied before the referee, the counsel spent about the same number of days in "preparing said cause for trial." This latter fact, as stated in the affidavit of Mr. Hiscock, one of the counsel for the defendant, is not denied. The fees of the referee were \$875. His report is not lengthy, but taken, in connection with the facts stated in the affidavits, aids, somewhat, in reaching the conclusion, upon this motion, that the case was "difficult and extraordinary."

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The affidavits disclose facts from which it must be assumed that the law of trusts and trustees was involved in and considered in connection with the evidence, at the hearing and upon the argument of the cause.

The conclusion cannot be resisted that it was a case both extraordinary and difficult in its features. (*Sackett v. Ball*, 4 How. Pr. 71. *Powers v. Wolcott*, 12 id. 566. *Woods v. The Illinois Central R. R. Co.*, 20 id. 285. *Fox v. Fox*, 24 id. 385.)

The views stated by Johnson, J., in 29 N. Y. 426, are applicable to this case, and must be followed. He says: "The object and intention manifestly were to enable the prevailing party to obtain indemnity for *his expenses* in actions of this kind, which would not be covered by the ordinary allowance prescribed for all actions." * * * "And I am clearly of the opinion that no such allowance can be made in any case *without proof* showing the necessity of further *indemnity* for the expenses of the action and the amount of the expense incurred for which indemnity is thus sought. Most certainly this should be *required* when the application is made before a judge who did not try the action."

The proofs in this case are not disclosed, as they should be, to present the questions fully to the court, but they satisfy the court that the ordinary taxable costs furnish no sufficient "*indemnity*" for the labor of counsel and the *necessary* and *reasonable expenses* of the party successful in the action before the referee.

The conclusions are therefore reached, upon the proofs submitted:

1. That this case comes within the provisions of section 809 of the Code as it now stands amended.
2. That the basis of estimate is the value of the property directly *affected* by the judgment; that being the "subject matter involved."

Matter of North Shore Staten Island Ferry Company.

3. That the further allowance is made by way of an indemnity to the party succeeding in the litigation.

4. That the court must fix the amount to be allowed. The maximum, the statute provides, shall not exceed five per cent "on the amount of recovery or claim or subject matter involved." Subject to that limitation, the sum will depend upon the proper deductions from the proofs submitted as to the indemnity needed for *actual expenses* in the action, necessarily or *reasonably* incurred beyond the taxable costs allowed by statute to the prevailing party. (29 N. Y. 428.)

The motion must be granted; and the order will fix the amount allowed; to wit, \$500.

[HERKIMER SPECIAL TERM, September 8, 1872. *Hardin*, Justice.]

63b 556
Sep157

In the matter of the NORTH SHORE STATEN ISLAND FERRY
COMPANY.

Upon the death of a stockholder in a corporation, intestate, and the appointment of administrators of his estate, and their acceptance of the trust, such administrators become, by operation of law, vested with the legal title to the stock, and consequently stockholders of the company, representing the estate of their intestate.

As such, they have all the rights appertaining to the ownership of the stock, one of which is, the right of voting at elections of directors of the company.

No formal transfer, on the books, is necessary to give this right.

The fact that the decedent held the stock subject to a trust or duty in favor of others does not affect the question. The right to vote follows the legal ownership, and the corporation has nothing to do with the equities between the owner and third persons.

Upon the death of a trustee of personal property, the trust devolves upon his representative. And as to everybody except the *cestui que trust*, such representative is absolute owner.

As trustee, however, he owes the duty of active management, for the protection

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and preservation of the trust estate. And where that consists of stock in a corporation, the duty of voting at elections of directors thereof is too plain for argument.

A PPEAL from an order made at a special term, setting aside and declaring null and void an election of directors of the North Shore Staten Island Ferry Company.

The affidavit of Mortimer L. Fowler, upon which the order to show cause was granted, alleged that George W. Wilson, late of the county of Richmond, deceased, died on the 15th of April, 1872, at his residence in said county, intestate. That on the application of his widow, Adele M. Wilson, to the county judge and surrogate of said county of Richmond, herself, the said Adele M. Wilson, and the deponent were, on the 23d day of April, 1872, duly appointed respectively the administratrix and administrator of said George W. Wilson, deceased, and thereupon entered upon their duties as such, and still continue to act as such administratrix and administrator; their appointment aforesaid never having been revoked. That The North Shore Staten Island Ferry Company, is a corporation duly incorporated under the act of the legislature of the State of New York, entitled "an act to authorize the formation of corporations for ferry purposes," passed April 9, 1853, being chapter 135 of the session laws of that year. That the capital stock of said company is divided into 12,500 shares, of which the deponent, in his own right, owns five shares. That at the time of the death of said George W. Wilson, and on and before the 11th day of April, 1872, and at the date of the election hereinafter mentioned, 5528 of the said shares stood in the name of said George W. Wilson, deceased, on the transfer books of the said company, and still so stand in his name. That on the 2d day of May, 1872, the annual election for fifteen directors (that being the number prescribed in the certificate of incorporation of said company) of said company for the coming year, was held at Port

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Richmond landing, in said Richmond county, pursuant to notice duly published. That deponent attended such election, and produced and exhibited to the inspectors thereof a certificate of said county judge and surrogate of the due appointment of the said Adele M. Wilson and deponent as such administratrix and administrator as aforesaid, endorsed upon which certificate was a power of attorney to deponent to vote at said election, executed by said Adele M. Wilson, as such administratrix as aforesaid, the execution whereof was duly acknowledged. That thereupon the deponent, as such administrator and attorney, tendered a vote upon the shares of the said George W. Wilson, deceased, for certain persons named as directors. That thereupon one of the said inspectors referred to one of the transfer books of said company, and refused to receive said vote because the name of the deponent, as such administrator, did not appear on the said transfer book; although the name of said George W. Wilson did appear as the owner of the number of shares above stated. That the other inspectors, on being applied to, also refused to receive the said vote, for the same reason. That some time afterwards, and after other votes had been received, the deponent again applied to vote as representative of the estate of said George W. Wilson, deceased; that said vote was again refused, for the same reason as above stated, to wit, because the name of the deponent, as such administrator, did not appear upon the said transfer book. That thereupon, certain persons then present, other than the said inspectors, stated that they challenged and objected to said vote upon the ground above mentioned, to wit, the reason why said vote was refused by the inspectors, and also upon the ground that the said George W. Wilson was not the real owner of the stock standing in his name as aforesaid. And one of said persons further stated that he should urge said objections upon any proceeding which might be taken to set aside such election. And upon the

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deponent's again tendering his vote as the representative of George W. Wilson, in person, or as his proxy duly authorized by said surrogate, at the same time producing and exhibiting his letters of administration, and an affidavit of the deponent of the death of said Wilson, that he might make such tender, claim and demand to vote in such capacity in all respects legally sufficient, the said person who had stated that he would urge objections as aforesaid, admitted that said tender, claim and demand were sufficient. That after the closing of the polls at said election, the said inspectors returned the result thereof, and certified that certain persons named in their certificate were elected directors of the company for the ensuing year.

The deponent further alleged, that had not his vote, as administrator as aforesaid, been rejected, none of the said persons, excepting William T. Garner, would have received votes sufficient for election, but that certain other persons (named) would have been elected; and that no person or persons other than the deponent offered or claimed the right to vote upon the stock so standing in the name of George W. Wilson, and the deponent, at the time of said election claimed, and now claims, that the action of said inspectors in refusing to receive his vote as aforesaid was erroneous and illegal.

Upon this affidavit, and the exhibits thereto attached, and the affidavit of W. H. Pendleton, an order was made, to show cause why the election of fourteen of the persons named in the certificate, as directors, should not be set aside, and declared null and void on the ground of improperly rejecting the vote of said Fowler, as administrator, &c., and why the persons certified to have been elected should not be permanently enjoined and restrained from action as directors of said company, by virtue of said election; and why a new election for directors of said

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company should not be ordered, and further or other relief granted.

On the hearing of the order to show cause, before Justice Leonard, it was ordered and adjudged, that the inspectors of election erred in rejecting the vote of Mortimer L. Fowler, as administrator, and Adele M. Wilson, as administratrix, as tendered by said Mortimer L. Fowler, as administrator, and in not receiving the same when so tendered. And it was further ordered, that the election of fourteen of the persons named in the certificate, be, and the same was thereby set aside, and declared to be null and void, and that a new election be held for fourteen directors of the said company, in their places.

B. W. Huntington, for the appellants.

I. The inspectors had no power to accept the rejected vote, and their acceptance of it would have been a disobedience of the statute and void, if not a misdemeanor. The language of the statute is: "In all cases where the right of voting upon any share or shares of any incorporated company of this State shall be questioned, it shall be the duty of the inspectors of the election, to require the transfer books of said company, as evidence of stock held in the said company, and all such shares as may appear standing thereon in the name of any person or persons, shall be voted on by such person or persons directly by themselves or by proxy, subject to the provisions of the act of incorporation." (1 *Edm. Stat.* 561, § 6. 2 *R. S.* 600, § 6, 5th ed.)

II. It requires a statute to authorize an administrator to vote as a stockholder. In Massachusetts a statute allows it, in these words: "An executor, administrator, guardian or trustee, shall represent the shares or stock in his hands at all meetings of the corporation, and may vote as a stockholder." (*Gen. Stats.* [1860,] 385, § 11.) There is no such statute in this State. But the necessity of a statute is

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recognized in our system of legislation. In many of our incorporation acts, the phraseology is substantially the same as in the Massachusetts statute. Thus in the following acts the provision is in these words: "Every such (holding stock) executor, administrator, guardian or trustee, shall represent the share of stock in his hands at all meetings of the company, and may vote accordingly as a stockholder." (*Manuf. Co's. Act*, 2 R. S. 662, § 40, 5th ed. *Building and Loan Co's. Act*, Id. 783, § 13. *Building Co's. Act*, Id. 788, § 17. *Lake and River Navigation Co's. Act*, Id. 801, § 17.) In the *Railroad Co's. Act*, (2 R. S. 671, § 11, 5th ed.) and *N. Y. City Stage Route Co's. Act*, Id. 813, § 11,) the estates of the administrators, &c., are made liable as stockholders, while the representative right to vote is not given. But a comparison of the act relative to ferry companies, (Id. 811, § 60,) and the act relating to bridge companies, (Id. 733, § 5,) completely illustrates the difference in legislation; the ferry companies' act being the one under which this company was organized. The pertinency of these statutes is settled by authority. In the *Long Island R. R. Co. Election Case*, (19 Wend. 43,) the court derived "the understanding of the legislature" from an examination of the charters of incorporation from the earliest period.

III. "The shares of a deceased proprietor belong to his executors, and, in a sense, the executors become the owners of the shares; but they are not, within the meaning of the deed, proprietors of the shares—not personally subject to the liabilities annexed thereto, until they have been accepted as transferees and a transfer has been made to them. The executors being, in a sense, warranted by the deed, the owners, although not the proprietors of the shares of a deceased proprietor, are subject to the approbation of the directors, which is made necessary, entitled to require a transfer of the shares to themselves or a vendee, and may assent to a transfer to a legatee." (*In re*

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The Northern Coal Mining Company, 13 *Beav.* 139.) For the distinction between stock owners and stockholders, and that the transfer book is the test, see *Schuyler case*, (34 *N. Y.* 80;) *Jones v. Terre Haute R. R. Co.*, (17 *How.* 529.) The by-laws of this company fix the same rule.

IV. The provisions of the ferry companies' act as to personal liability are very simple; and although they have not been construed in this State with reference to the liabilities of the estates of deceased stockholders, the question has been raised in Massachusetts under a similar provision, and it has there been held that the stockholder's liability ceases upon his death. Our ferry corporations' act (2 *R. S.* 809, § 70, 5th ed.) merely makes "stockholders" liable for debts due laborers, &c., and to creditors to the amount of their stock for all debts and contracts until the whole amount of the capital stock should be paid in and certificate filed; the same provision being constructively applicable to increase of stock. By the Massachusetts act of 1808, if the corporation, within fourteen days after demand, does not show property sufficient to satisfy any execution, the same may be levied upon the body or estate of any member of the corporation. *Held*, that the estate of one who "had ceased by his death to be a member of the corporation before the suit was brought," was not liable within the intent of the statute. (*Child v. Coffin*, 17 *Mass.* 64.) The case of *Ripley v. Sampson*, (10 *Pick.* [27 *Mass.*] 371,) went further, and held that the statute did not affect the estate of a deceased corporator at all, and that the administrator could not be allowed in his account for contributory payments to make up a deficit against the corporation. Cases in this State where the estates of deceased corporators have been held liable, have been under different and more stringent statutes than the ferry companies' act, and the case of *Bailey v. Hollister*, (26 *N. Y.* 112,) is not contrary to the above, because there the charter allowed debts "to be recovered of

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the stockholder who is such when the debt is contracted," and after the death of the stockholder the stock was actually transferred to his estate upon the stock ledger, and his administratrix was drawing dividends under the transfer when the debt was contracted.

V. It is a grave question, and unsettled, whether an administrator can or ought to make the estate of his intestate a stockholder in a corporation, without a statute authorizing him to do so. (*Ang. & A. § 533. 5 Taunt. 581.*) In *Ripley v. Sampson*, (*supra*,) his duty whether or not to pay an assessment (which is a lien on the share) is said to be indicated by the interests of the estate. By the ferry companies' act, shares are forfeitable if calls are not paid, and the capital may be increased so that calls are possible in this case. The administrator could not justly make the estate he represents liable on Garner's shares, nor, unless the interest of the estate required it, upon its own shares.

VI. The company is, by act of incorporation, which is a contract, (*Dartmouth College v. Woodward*, 4 *Wheat.* 518; *Hamilton v. Kutte*, 5 *Bush*, 458,) entitled to insist that a stockholder shall have no more votes than he owns shares. The act is subsequent to the act of 1825 relating to the transfer books; and if the court can go behind the transfer books for the purpose of getting at the right of Fowler to vote, it can go behind them to ascertain whether Wilson himself was a qualified voter by the act of incorporation as a stockholder, and owning the stock standing in his name. The inspectors are confined to the transfer books by the statute, but the court goes behind them, (*ex parte Holmes*, 5 *Cowen*, 426,) and behind the ballots in a State canvass, to ascertain the intentions of the voters. (*The People v. Cook*, 8 *N. Y.* 80, 81, *et seq.*) The statute authorizing these proceedings requires such order as justice and right demand, and this includes going behind the transfer books.

VII. Neither Wilson nor his administrator owned these

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shares in the sense of the ferry companies' act, or bridge companies' act, nor in the general legislative sense. (*Stover v. Flack*, 41 Barb. 162.) They were not recognized as, and were not, assets. (*Touch*. 496. 2 *Williams' Executors*, 1496. 8 *Serg. & R.* 402. 3 *Brev.* 495. 42 *Ala.* 401.) One who has not a substantial interest in shares cannot vote, without the concurrence of the real owner. (*Philips v. Wickham*, 1 *Paige*, 590.) Membership in a corporation is personal, and does not go to the administrator, within 1 *Wms.* 727, 793.

VIII. The right of voting by proxy is not a common law right, but depends upon legislative sanction. (*Angell & Ames*, §§ 128, 130, and cases cited.) The only proxy at common law was by peers of the realm. An executor of a peer would hardly be recognized in the house of lords as his proxy. By the ferry companies' act, "the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy." A dead man cannot attend, and is not a stockholder.

IX. The incorporating act says, that transfers shall be according to the by-laws; and the by-laws prescribe the conditions of transfer. Wilson was only a trustee. His administrator cannot be more than a successor in the trust. The resignation of one trustee and election of another do not work a transfer, within any known rule of law. The transfer must be made by an assignment on the transfer books. (*Mohawk and Hudson R. R. Co.*, 19 *Wend.* 146.) An administrator is the agent of the law to make this transfer either to himself, as administrator, or as trustee, or to some one else. (*Middlebrook v. Merchants' Bank*, 3 *Keyes*, 135. *Dayton on Sur.* 304) But, until he makes it, although he has the estate, the stock has no voting capacity under the act of incorporation, which, as shown above, is a contract; nor, under the by-laws, which are a part of the act. The corporation can and does insist upon this contract. It is intended for the security of the

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company. (*Duke v. Cahaba Nav. Co.*, 10 Ala. 82.) The holder of stock, though owner as against the assignor, does not have the legal title, as against the corporation, until the transfer takes place. (*Conneau v. Guild Farm Oil Co.*, 3 Daly, 220.) And the by-laws regulating transfers are a contract between the company and every share owner, whether holder or not, (*Schuyler's case, supra*), the breach of which in that case made the company liable to Surgit, one of the aggrieved parties.

X. The provisions of the voting act, and of the ferry companies' act, requiring the name to be on the transfer book, and limiting the votes of stockholders to the number of shares they own, are peremptory and reasonable, and can be complied with by administrators and all other parties. Courts, therefore, have not the legal power to disregard them. (*Matter of Empire City Bank*, 18 N. Y. 215. If the incorporating acts are defective in not providing for cases of death after closing the transfer books, the legislature must supply the remedy. The argument from necessity is not tolerated in corporation cases. (*L. I. Railroad*, 19 Wend. 37.)

XI. There is no case in this State where a corporate election has been set aside for rejecting the vote of a person whose name was not on the transfer books. Most of the cases are cited *supra*; see also *Ex parte Jacob Barker*, (6 Wend. 509,) where the name was on the books, though as trustee; *Ex parte Willcocks*, (7 Cowen, 402,) where the pledger's name was on the books. In the *L. I. Railroad case*, (*supra*), although the challenged voter had done all he could to get his name on the books and transfer had been wrongfully refused, the election was not set aside on that ground, but because his vote on proxies of stock on the books was rejected. In this case the administrator made no attempt to effect the transfer; if he had any equities and was refused transfer because the books were closed, the courts would have helped him if possible, and

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relieved the transfer officer of responsibility. But both his intestate and Garner were at least criticisable for leaving the stock in Wilson's name, Wilson being of inadequate estate to protect the company, and both he and Garner contemplating a misuse of the shares.

XII. "The right of voting at elections for corporate officers, conferred by the charter, is not to be tested by the mere ownership of stock, but the transfer of it must be patent upon the stock book. The registry alone confers the right to vote." (*Monseaux v. Urquhart*, 19 La. 482,) decided upon the New York authorities.

XIII. Whatever personal interest Wilson had in this stock was as a partner with Fowler. If stock owned by a partnership stands in the name of one partner and he dies, his administrator cannot vote upon it. (*Allen v. Hill*, 16 Cal. 113.)

XIV. The incorporating act defines as the body corporate, "the persons signing such certificate and such others as may become stockholders." An administrator who merely has shares in his hands as assets, which is not this case, is not, within the statutes and decisions of this State and the by-laws of this company, a stockholder in a corporation of this kind. Under our judicial decisions and system of legislation, a special definition of "stockholder" as used in the moneyed corporations' act has been made necessary; which shows that a statute is required to enlarge the legal meaning of the term.

XV. In England, by statute as far back as George I, no person to whom shares have been transmitted by death or bankruptcy, can receive dividends or vote until his title is registered in the books of the proper company. (5 *Exch.* 129.)

XVI. In the matter of accepting the votes of only such persons as appear by name on the transfer books, the act of the inspectors is purely ministerial. (*Mohawk R. R. Co.*, *supra*. *The People v. Cook*, *supra*. *Matter of Cecil*, 36 *How.* 478.) Their act in this case having been entirely

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legal, the appellants have a legal title to the office, and cannot be ousted under the statute, unless "justice and right" require it. Justice and right are entirely on the side of the appellants, as against these fictitious stockholders. The relation between directors and stockholders is that of trustee and *cestui que trust*. (*Butts v. Wood*, 37 N. Y. 317;) and turning out veterans and surrendering the management to directors who merely hold five shares apiece, colorably, and by gift from a speculator, in his interest, and in evasion of the statute requiring fifteen directors (for they make the speculator a majority of the board,) is giving the lamb to the wolf. The Supreme Court in *Ex parte Holmes*, (*supra*), reprobated wielding stock for the purpose of an election. Transfers of stock for electioneering purposes are against public policy; are pronounced against by the legislature in several instances; and are held to be void as against those instrumental in bringing them about. (*Sabin v. Bank of Woodstock*, 21 Vt. 361.)

Sidney S. Harris, for the respondents.

I. The inspectors erred in refusing to receive the vote of the administrators of the estate of George W. Wilson, deceased. Mr. Wilson owned 5528 shares of stock, and, if the vote of the administrator had been received, none of the directors declared elected by the inspectors would have been so elected, except Mr. Garner, who was on both tickets, and the respondents would have been elected.

II. The facts stated in the moving papers of the respondents are admitted, and the sole question is, whether an administrator can vote on the stock of the intestate, coming into his possession, upon the production of his letters of administration and certificate of the surrogate, that he has qualified, and is acting as administrator upon the estate of the intestate. At common law the administrator has the right to vote, although the stock does not stand in his name. Every person in whom the legal title stood, at

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common law, had the right to vote. (*Angell & Ames on Corp. p. 70, 2d ed.*) The statute making the transfer books evidence of the ownership of stock, was passed to afford corporations a reasonable certainty as to who were stockholders. In case stock had been hypothecated or otherwise pledged and several persons claimed the right to vote, the transfer books were generally to be followed as a guide in determining who were the owners of the stock. This, it has been held, is not an absolute rule without exception. (*Ex parte Holmes, 5 Cowen, 426, 434. Ex parte Willcocks, 7 id. 410.*) The statute may be said to regulate the voluntary transfers of stock, and was intended to furnish a guide to inspectors as to voluntary dispositions or transfers of stock by persons who were owners in their own right, but it is submitted that in cases of involuntary transfers, by act of law, as by the death of a stockholder, where the title to the stock is cast, by law, upon the administrator in a representative capacity, the statute has no application. Executors and administrators are not within the mischief intended to be remedied by the statute requiring registration of stock. They represent all parties beneficially interested in the estate. (*Bayard v. Farmers' Bank, 52 Penn. 232.*) And there is no danger of fraud or wrong being done to any one by allowing them to vote. They are directly under the control and supervision of the courts, and the statute does not apply to them. The statute does not require transfers in such cases. The death of a stockholder does not work such a transfer as requires registration by the administrator. It is not such a transfer as a living stockholder makes when he sells the stock. The administrator comes by operation of law in place of the deceased, as the representative of his estate, and the certificate of the surrogate and letters are conclusive evidence of his right to vote, and the inspectors are required to recognize them as giving the requisite authority. This is necessarily so, as the statute making the transfer books

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evidence generally, of the right to vote, (2 R. S. 600, § 6, 5th ed.,) is in derogation of common right, and must be strictly construed. Before the statute, whoever had the legal title could vote, and the statute, making the transfer books evidence, must be strictly construed, and restricted to cases within the letter of the act, and should not be extended to cases not within the spirit of the act. (*The Bridgewater and Utica Plank Road Co. v. Robbins*, 22 Barb. 662.) This is especially so, when the act is in favor of corporations. It cannot be extended by equitable construction, even to cases within the mischief of the act. (*Bridgewater and Utica Plank Road Co. v. Robbins*, *supra*.) The right to vote by proxy is not a common law right, and the statute in that regard, is enabling, and should be liberally construed.

III. The statute, (2 R. S. 600, §§ 5, 6,) has been in force nearly fifty years, and thousands of cases must have arisen, calling for the application of the statute to administrators and executors, and the practice has been so uniform and general, that no case has arisen where the right of the administrator to vote has been denied by any decision; on the contrary, it has been taken for granted that administrators and executors could vote. See *People v. Tibbets*, (4 Cowen, 359,) where the vote of the administrator was challenged, but abandoned, and the learned counsel on each side conceded the right of the administrator to vote. (See remarks of Chancellor Jones on p. 364, and *Abraham Van Vechten*, on p. 374.)

IV. Presumptively, all stock should be represented, or at least is entitled to be voted upon at an election of officers. It is not lawful to take away the right of any share to be voted upon. Hence, by-laws infringing upon this right have been declared void. (*People v. Kip*, 4 Cowen, 382.) The inspectors having refused the right of the administrator to vote, the death of Mr. Wilson is made to work a forfeiture of the right to vote on his stock.

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V. The statute gives the right to vote by proxy. If Wilson were living, he could have given a proxy; but, having died, the law has constituted his administrators his attorneys or proxy. They have received letters and certificates, which constitute a perfect legal proxy, by act of law, the administrators being invested, in a representative capacity, with all the authority the intestate had before his death, and are of equal force and validity as a proxy given by Mr. Wilson, if living. If an administrator asks to have the stock registered in his name, it is because he is the representative and proxy of the intestate, or of his estate, and not because he has any title in his own right. He comes in by act and operation of law, (*The People v. Tibbetts, supra*, 374.) and not as a purchaser. As to meaning of proxy, see *Burrill's Law Dictionary*, title *Proxy*; *Bouvier's Law Dictionary*, title *Proxy*; *Webster's Dictionary*; *Worcester's Dictionary*. The statute (2 R. S. 807, § 60, 5th ed.) under which the company is incorporated provides, that "the election shall be made by such of the stockholders as shall attend in person or by proxy." The administrator is invested with all the authority the intestate had. (*Diven v. Duncan*, 41 Barb. 524. *Bailey v. Hollister*, 26 N. Y. 112. 41 Barb. 490.) He can sell the stock, and transfer it to the purchaser; and is, in his representative capacity, by legal appointment, *ex necessitate*, the legal proxy and attorney to do all acts the intestate could do, as well respecting the sale of the stock as voting upon it. It would seem as if the question were very plain. The administrators are, *ex necessitate*, the legal proxies and attorneys of Wilson and his estate, and the production of the letters and certificate of the surrogate are of equal force and validity as the proxy of Wilson, if living; and no registering of the stock is required, or would increase in any way the authority of the administrators to vote. They are the lawful representatives of Wilson, and the letters and certificate are the proxies, or power of attorney to

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vote on the stock. And where there are two administrators, both being invested with equal authority, one could vote on the stock, unless the other objected; but, here, the administratrix invests Mr. Fowler with the authority to act for her, and consents to his voting on the stock. This agrees with the universal practice in such cases.

VI. Whether Mr. Garner or any one else has any interest in the stock standing in the name of Mr. Wilson, is wholly immaterial. (*Long Island R. R. Co.*, 19 *Wend.* 37. *The Mohawk & H. R. R. Co.*, *Id.* 135. *Ex parte Willcocks*, 7 *Cowen*, 402. *Ex parte Holmes*, 5 *id.* 426. *The People v. Tibbets*, 4 *id.* 358. *The People v. Kip*, *Id.* 382, *note.*) In such a case, the stock would devolve upon the administrator, and he would still represent it. (*Bunn v. Vaughan*, 3 *Keyes*, 345.) The order should be affirmed, with costs. (*Act of 1854*, *Laws of 1854*, 952, § 3.)

By the Court, GILBERT, J. The statute under which this company was incorporated, (3 *Edm. Stat.* p. 872,) provides that the stock of the company shall be deemed personal estate, (§ 10,) and that each stockholder shall be entitled to as many votes as he owns shares of stock in said company. (§ 4.)

Upon the death of Mr. Wilson, the intestate, and the appointment of Mr. Fowler and Mrs. Wilson as administrators of his goods, &c., and their acceptance of the trust, the latter became, by operation of law, vested with the legal title to the stock in question, and consequently stockholders of the company, representing the estate of the decedent. As such they had all the rights appertaining to the ownership of the stock, one of which was the right of voting at elections of directors of the company. (*The People v. Tibbets*, 4 *Cowen*, 364. *Baily v. Hollister*, 26 *N. Y.* 112, *Middlebrook v. Merchants' Bank*, 3 *Keyes*, 135.)

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No formal transfer on the books was necessary to give this right.

The fact that the decedent held the stock subject to a trust or duty in favor of others does not affect the question.

The right to vote follows the legal ownership, and the corporation has nothing to do with the equities between the owner and third persons.

Upon the death of a trustee of personal property, the trust devolves upon his representative. And as to everybody except the *cestui que trust*, the latter is absolute owner. (*Bunn v. Vaughan*, 3 *Kryes*, 345. *Ex parte Wilcocks*, 7 *Cowen*, 402.) As trustee, however, he owes the duty of active management for the protection and preservation of the trust estate. Where that consists of stock in a corporation the duty of voting at elections of directors thereof is too plain for argument.

The order appealed from should be affirmed, with costs.

[SECOND DEPARTMENT, GENERAL TERM, at Brooklyn September 9, 1872.
J. F. Barnard, Gilbert and Tappan, Justices.]

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In the matter of BROADWAY WIDENING.

Where two of the justices assigned to the general term of the Supreme Court in the first department are, by reason of interest, incapable of sitting, on an appeal, the general term may be held by one of the justices of the first department, assigned to hold general terms, and two justices from another department.

The appeal, in such a case, need not be sent to another department, under section 10 of chapter 408 of the Laws of 1870.

Where the statute, under which commissioners of estimate and assessments in the matter of widening a street are appointed, expressly authorizes two of the commissioners to act, and declares that their acts shall be as valid as the acts of all, a report signed by two of them, only, is valid.

The provision, to that effect in the act of 1818, is not abrogated by section 7, article 1, of the constitution of 1846, which requires compensation to owners

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of property to be ascertained by a jury, or by not less than three commissioners.

Notwithstanding the constitutional provision, the legislature can authorize a decision by a majority of the commissioners.

A provision in a statute authorizing the widening of a street, which requires that the report of the commissioners shall be made within six months, is to be deemed merely directory, and not a matter of jurisdiction. If the report is not made within the time, jurisdiction is not lost by the delay.

A clause in a statute by which a majority of the new commissioners of estimate and assessment, therein directed to be appointed by the court, are required to be other than the former commissioners, is not to be construed as a violation of the constitutional provision giving the appointing power to the court.

A statute authorized the court to refer the matter of widening a street to new commissioners, after vacating a former order of confirmation, on a notice of five days. The court having, under this act appointed commissioners and one of them having declined to act; *Held* that the same court had power to supply his place without notice of the motion for an appointment. That want of notice could be only an irregularity.

When the value of land taken for a street improvement is awarded to the landlord, and the value of the buildings thereon is (according to the provisions of the lease) awarded to the tenant, this makes the total value of the property, and nothing more can be required.

A minority report from the commissioners cannot properly come before the court. There can be only one report, and that is the report of the whole, or a majority, of the commissioners.

By an act, passed February 27, 1871, the legislature authorized the court to vacate an order of confirmation, and to refer the matter back to commissioners. The act directed the commissioners to amend and correct said report, or to make a new assessment, in whole or in part, as the court should direct. The act further authorized the commissioners, in making such corrected or new assessment, to assess any and all property which they might deem benefited, and repealed the former limitation. (*Laws of 1871, ch. 57, § 4.*) The court, by an order granted April 3, 1871, vacated the order of confirmation, and directed the new commissioners to amend and correct said report and to make a new assessment in whole. *Held* that whatever the language of the order was, the act was plain; and that the commissioners could go beyond the former area of assessment.

THIS was an appeal, by Robert J. Livingston, from an order of Judge Gilbert, confirming the report of the commissioners appointed to widen Broadway from 34th to 59th streets, in the city of New York, under the act

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of the legislature of February 27, 1871. (*Laws of 1871, chap. 57.*)

The notices required by law, the abstract of the report, and the final report were all made and given by two of the commissioners. The third commissioner refused to act with his colleagues, from an early period of their work. He presented a minority report, in which he stated that the majority report was made without meeting, deliberating or consulting with him.

The appellant, Livingston, objected to the confirmation of the report, at the special term.

The following opinion was delivered at the special term, on a motion to confirm the report of a majority of the commissioners.

GILBERT, J. Nothing appears in the papers before me warranting the inference that the commissioners have been influenced in making their determinations by any unworthy motive, or that, excepting some omissions, which will be mentioned presently, they have committed any error of which the court can take cognizance. It was, indeed, stated by the counsel for some of the objectors that one of the commissioners owned some lots which were within the former district of assessment, but are not within the present one. There is not, however, any evidence of this fact, or any circumstance indicating that if it exists it had any influence on the action of either commissioner. The presumption of law in favor of the fidelity of all public officers, therefore, must be applied in this case. Upon such facts the rule of the law is firmly established, that the determination of matters of fact by the commissioners is final and conclusive, and not in anywise the subject of judicial review. It is only where the proceedings show that they acted upon some erroneous principle or rule of valuation, or violated some legal right, that the court can interfere with their decision. Neither of these facts has

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been shown. Disparity in valuation, no doubt, appears, but such disparity does not prove error. They who allege error must give evidence showing, not merely that inequality of valuation exists, or that their property is of equal value with that allowed in particular cases to others, but that, in point of fact, it exceeds the valuation awarded to them. For otherwise, an error in making an excessive valuation of one man's property would enable every owner of property taken to derive a benefit from such error. The rule stated governs both the assessment for benefits and the award for damages. With respect to the assessment for benefit, it has been urged that the commissioners erred in establishing the district of assessment. It is said that much of the property in the district will derive no benefit from, but will be injured by the proposed improvement, and that most of the property most directly and certainly benefited by the improvement has not been assessed at all. The answer to this objection has already been made, namely, that it is a subject which the law commits solely to the judgment of the commissioners. The court is not authorized to assume that the statement is true in point of fact, or to overrule their determination honestly made. It is also insisted, that the order under which the commissioners acted did not empower them to make a new district of assessment, but that they were restricted within the limitations on this subject contained in the act of May 17, 1869. I am of a contrary opinion. The order required them to "make a new assessment in whole, both as to awards for damage and assessment for benefit." The order does not, and could not properly, contain any restriction upon the discretion of the commissioners in performing the duty thus devolved upon them. For, by the act of February 27, 1871, power was expressly given to the court or justice to direct a new assessment in whole or in part, and to the commissioners, "to assess any and all property which they deemed bene-

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fited by the improvement," and the limitation contained in the act of 1869 was explicitly abrogated. The order having directed a new assessment in whole, the commissioners had the right, and it was their duty to exercise the discretion conferred upon them by the statute, by assessing such property as they deemed benefited, and by apportioning the burden according to their estimate of the benefit which each parcel would receive. This they have done, and, as already stated, no legal error in their proceedings has been shown. The addition of \$300,000 to the assessment against the mayor, aldermen and commonalty of New York, even if irregular, forms no ground of complaint by individual tax-payers. (18 N. Y. 155.) Moreover, they were benefited by it. No objection has been presented on behalf of the corporation. It was also objected, that these proceedings are illegal for several reasons. It may be doubted whether some of this class of objections can be properly presented for adjudication in this mode. (*Embury v. Conner*, 3 Comst. 523.) But, counsel having argued them, I will dispose of them as well as I can.

First. It was insisted that the fourteenth amendment of the constitution of the United States had been violated, for the reason that the State had, by that amendment, been deprived of the power of taking the property of its citizens without due process of law, which, it was claimed, meant by the ordinary forms of judicial action.

I am of opinion that this objection is not tenable. Surely, whatever the fundamental law of a State has established, as a rule for the protection of private rights, applicable alike to all its citizens, is due process of law. (*Westervelt v. Gregg*, 12 N. Y. 209. *Bank of Columbia v. Oakley*, 4 Wheat. 235.) The same provision on this subject was embodied in the constitution of the United States, before the adoption of the fourteenth amendment, and was also contained in the constitutions of this State of 1822 and

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1846. Under these provisions it has been uniformly held, that the authority exercised by the legislature in this case was valid. These adjudications on the question, for the reason that this proceeding, if inhibited by the fourteenth amendment, was equally a violation of similar prior provisions of the constitution of the United States, and of this State, show that to be an erroneous conclusion.

Second. It was urged that the appointment of Mr. Wood as commissioner, was invalid, because it was made without notice. He was appointed upon the happening of a vacancy, occasioned by the resignation of a commissioner previously appointed. I think, in such a case, the court may, of its own motion, fill the vacancy, and that no notice is necessary. Neither the act of 1813, nor the amendatory act of 1839, makes any specific provision for such a notice, nor does it seem to be necessary to protect any right involved in the proceeding. The selection of the commissioners rests exclusively with the court, and no one is entitled to produce evidence, or to do any act for the purpose of affecting such selection. It is not perceived, therefore, that a notice would serve any purpose, except to delay the proceedings.

Third. It appears that the report before me is signed by only two of the commissioners, and that the other commissioner dissents from it altogether. It is insisted that the constitution of this State, requires the concurrence of all the commissioners. In a case before this court, at general term, in the first district, (*In the matter of the extension of Church street*, 49 Barb. 455,) this precise question was decided, in June, 1867. It was there held that such concurrence was not necessary. If I entertained any doubt on this subject, I should feel bound by that adjudication. But I quite agree with the reasoning upon which it was made. It is an undoubted rule of the common law that when a power is to be exercised by several persons, a majority, upon a meeting of all, are

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competent to do the act. This rule was declared in the Revised Statutes, (2 R. S. 555, § 27,) and is still in force. Although the language of the constitution is, that the compensation "shall be ascertained by not less than three commissioners," yet there is nothing to indicate a design to change the mode of proceeding governing such bodies prescribed by the common law, and the statute. On the contrary, we are bound to presume that if such intention had existed it would have been expressed in terms; and this presumption is fortified by the provision contained in section 17 of article 1 of the constitution, whereby certain parts of the common law and the statutes in force in this State, not repugnant to the constitution, were continued in force. There is no repugnancy between the familiar and necessary rule referred to, and the constitution; for it is clear that all the commissioners aid in performing the duty assigned to them, whether their action produces unanimity or not, and whatever they do forms an element of the ultimate decision. Not being repugnant, the old rule mentioned, therefore, has been preserved. It abundantly appears that the dissenting commissioner met with his colleagues in the legal sense of that term. No formality beyond actual consultation is requisite. He attended the meetings of the commissioners for several months, and put in a dissenting report at the end of the proceeding. This is quite sufficient. The point here presented was not decided in the case of *The Board of Water Commissioners v. Lansing*, (45 N. Y. 19.) In fact the precise question was not involved in the case, for the reason that the statute upon which that case arose, was passed after the adoption of the constitution, and was not, therefore, affected by section 17 of article 1 of that instrument. It may be added that the provision of the constitution here invoked has no application to the duty of the commissioners in fixing a district of assessment, or in apportioning the amount assessed. That is an exercise

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of the power of taxation, and not of the right of eminent domain, and the statute (*act of 1813, § 88,*) authorizing two commissioners to perform the trusts and duties imposed on all, governs this branch of the case. (*People v. Mayor &c., 4 Comst. 420. 41 N. Y. 139.*)

Fourth. It was also objected that the report is invalid, because it was not made within six months after the making of the order appointing the commissioners, as required by the act of February 27, 1871. There being no negative words in the statute prohibiting the making a report after the time limited, and no injury appearing to have occurred to the objector in consequence of the omission to do so, this provision must be deemed directory merely, (*Cooley's Const. Lim. 75, et seq.,*) and a performance of a public duty, after the lapse of the period within which the statute directed it to be done, is in such a case good. (*Idem.*)

The remarks already made dispose of all the objections, excepting those presented by Mr. Sacchi, Mr. Thompson, Mr. Murtha and Mr. Bagley. I am of opinion that the claim of Mr. Sacchi is not well founded. The commissioners would not have been justified in awarding compensation for prospective losses, and by the terms of Mr. Sacchi's lease, his landlord is entitled to the "whole award for damages to the buildings and improvements on the premises" leased to him. I think, however, that the commissioners erred in not making an award to Mr. Thompson, and in not apportioning the rent to accrue upon the lease of Mr. Murtha. I am also of opinion that there was an error in the taxation of the bill of Mr. Bagley. The report, therefore, must be sent back, in order that these errors may be corrected. In all other respects it is confirmed.

The appeal from this order coming on to be heard at the general term in the first department, in November, 1872, held by Justices INGRAHAM, BRADY and LEONARD,

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Justices INGRAHAM and BRADY announced that they were disqualified, by interest, from hearing the appeal, and would not sit in the case. At the request of the presiding justice, Justices LEONARD and DANFORTH, of the third department, sat in this appeal, with LEONARD as presiding justice.

Lewis E. Delafield, for the appellant, took the preliminary objection that under section 10 of the judiciary act of 1870, (*Laws of 1870, ch. 408*,) the court as thus constituted, could not hear this appeal, but must send it to another department.

The court, after retiring to consult, overruled the objection, and directed the argument to proceed.

Mr. Delafield, for the appellant, then made and argued the following points:

I. An appeal lies to the general term. (*Matter of the Commissioners of Central Park*, 61 Barb. 40, and cases cited.)

II. The majority report is the work of the two commissioners, Wood and Jones, without meeting, consulting or deliberating with their colleague, Mr. Hennessey. This is a fatal defect, and their report should not have been confirmed. 1. The laws authorizing this assessment are in derogation of individual rights, and must be strictly construed. If there has been any failure to comply with the requirements of the law, the proceeding is invalid. Jurisdiction is acquired step by step, and ceases upon any failure to comply with the acts. (*Hopkins v. Mason*, 61 Barb. 470, and cases cited.) 2. The law requires all the commissioners to meet and consult together, and any determination must be made at a meeting when all are present. (*Board of Water Commissioners v. Lansing*, 45 N. Y. 26. *Doughty v. Hope*, 3 Denio, 249. *S. C.*, 1 N. Y. 79. *Parrott v. Knickerbocker Ice Co.*, 8 Abb., N. S., 234, and cases cited.) The general statute prescribes that a majority may decide "upon a meeting of all the persons empowered."

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(2 R. S. 575, § 27, *Edm. ed.*) In this case the majority report, and the notices show, that all the work was done by two commissioners. They read as if the subject had been committed to two; no reference is anywhere made to the third. It specially appears from the minutes, that the area determined on by the two commissioners was the result of an accidental omission of a clerk to impose any assessment upon the city. The new area was made, not because the first was wrong, or after any deliberation, but solely to avoid recasting the assessments. The assessment of \$1,200,000 upon the city was increased to \$1,500,000, in order to meet another clerical error. The question whether the city was benefited to this extent was never suggested. Neither act was the result of deliberation, and both were flagrantly illegal and arbitrary. It appears from the minority report, that the majority report was made, in all its important points, without meeting or consulting with Mr. Hennessy. 3. The learned judge below erred in supposing that it was sufficient consultation, if at some time in the course of the proceeding, all the commissioners met. In *The Water Commissioners v. Lansing*, (45 N. Y. 20,) they all met and could not agree, and afterwards two met, and made a majority report, which was therefore held bad. Mr. Hennessy had no notice to attend the meeting at which the area of assessment was adopted. Nor was it an adjourned meeting from one at which he was present. He refused, from the start, to sign the notices required by law, and so notified his colleagues. These facts are the reverse of those in the extension of Church street. (49 Barb. 458.) That case is either overruled altogether, or confined strictly to its own facts, by the decision in *The Water Commissioners v. Lansing*, (*supra.*) *The Board of Water Commissioners v. Lansing*, decides: 1st. That even though all met and consulted originally, they must all be present when the decision is arrived at and the report signed. 2d. That if two out of

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three (which was not decided) can act, the two must show affirmatively that they rendered their decision at a meeting at which the three were present. 4. Unless all three commissioners are present, no determination can be had on any subject. All they can do is to adjourn. If it be said that in this way any one, by absenting himself, could defeat the ends of the commission, the answer is, that the commissioners have no power to remedy this evil themselves, but that upon a proper application, the court would remove the delinquent commissioner, and appoint another in his place. This point has been determined in accordance with the above views. In *Beekmen's case*, (1 *Abb. Pr.*, *N. S.*, 451,) one of three commissioners absented himself from meetings of which he had full knowledge, and the court (Justice LEONARD delivering the opinion) held that the assessment was void in consequence. In *The matter of Palmer*, (31 *How. Pr.* 43,) this decision was sustained.

III. By the constitution of 1846, the rule that a majority of the commissioners in these cases may decide, where all consult, is abrogated. The compensation to be made "shall be ascertained by a jury, or by not less than three commissioners." (*Art.* 1, § 7.) Where there are only three commissioners appointed, they must all agree in every act, and unite in its expression. It is unnecessary now to inquire whether, if there were more than three, the compensation could be made by a majority which included as many as three. The three commissioners being substituted for a jury, are governed by the same rules, and must all agree. (*Water Commissioners v. Lansing*, 45 *N. Y.* 20.) Before 1846, no constitution of this State contained any clause permitting commissioners to take and assess property. This provision altered the existing law; it is repugnant to it, and does not come within section 17, article 1, of the constitution of 1846. The constitution must be strictly construed. There are no directory provisions in constitutions.

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IV. The legislature have no right to say who, or what class of persons, shall be appointed commissioners. This power is confided by the constitution to the court alone. (*Ganson v. City of Buffalo*, 1 *Keyes*, 458. *Opening of Eleventh avenue*, *Davies' Laws*, 1244.) The act of 1871, section 4, requires the appointment of one of the former commissioners. Whatever be the true construction of this section, Judge Cardozo acted under its restraint, and did not exercise the discretion intrusted to him alone. He so states in his opinion. The appointment is unconstitutional.

V. The commissioner's report is not made within the time prescribed, and is void. 1. The act reads "which report shall be made within six months after the order referring the matter to the commissioners." (1 *Laws of* 1871, 93, § 4.) They did not report until ten months after this order. The wording of the act is imperative; the intention was the same. When the legislature of 1871 met they found the following state of facts: Proceedings to widen Broadway had been pending since May 17, 1869. It was a matter of public necessity, and delay was injurious to all interests. The act of 1869, section 2, (2 *Laws of* 1869, p. 2238,) recognized this by directing the report to be made within eight months. A report was made under that act, and confirmed by this court, under which it was insisted that the city had acquired title to the land, and the property owners to the awards. The greatest confusion of rights prevailed. Suits were pending in the State, and United States courts. The effect upon the whole upper part of the city was disastrous. All improvements and sales along Broadway stopped. Meanwhile the value of property to be taken was increasing immensely. If Broadway was to be widened, it must be done at once, or the act would make it impracticable. The increase of the cost between 1869 and 1871 was already so great that the limitation of the area of assessment prescribed in 1869 was left to the discretion of the

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justice to remove in 1871. The legislature recognized those facts, and fixed the time in which the report should be made. Their intention further appears by the negative words in the act of 1871. The appeal must be taken within four months, and preference was given to it over all other business of the court. (§ 1.) Short notice of appeal was authorized. (§ 3.) The motion to vacate was to be on the short notice of five days. (§ 6.) The act took effect immediately. (§ 7.) To hasten matters, one of the former commissioners was retained. (§ 4.) The whole object of the act was to secure immediate action, and this was insured by requiring a report in six months. The limitation is mandatory, not directory. 2. The act of 1869 directed the commissioners to report in eight months. (§ 2.) The act of 1871, in six months. Whenever a statute directs an act to be done in a less time than was directed by a former statute, it is mandatory. For it appoints a new time instead of that formerly fixed. This must (if any language can) be considered imperative. (*Smith on Stat. and Com. Law*, § 667.) 3 Those statutory requisitions, which have been construed directory only, will be found not to affect the good of the people, and not to involve rights of property, but to relate to formal, mechanical or ministerial matters, where a compliance is a matter of convenience rather than substance. (*The People v. Schermerhorn*, 19 Barb. 558.) 4. In cases affecting assessments on property, the time fixed by law is mandatory. (*Thames Manuf. Co. v. Lathrop*, 7 Conn. 550. *Marsh v. Chestnut*, 14 Ill. 224.) 5. A justice must render judgment within the four days prescribed by the statute. After that his jurisdiction ceases. (*Young v. Rummell*, 5 Hill, 60. *Watson v. Davis*, 19 Wend. 371.) In the latter case, Bronson, J., holds a similar act imperative where there are no negative words. In the *Matter of Douglass*, the special and general terms of this court held, that an act requiring notices for local improvements to be pub-

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lished in all the corporation papers was directory. (58 *Barb.* 174;) the Court of Appeals held it mandatory. (46 *N. Y.* 42.) In assignments for the benefit of creditors, it is necessary that the assignee make the acknowledgment required by the statute before the title will become vested in the assignees. When a statute, though only affirmative in form, implies a negative, it is to be deemed imperative. (*Hardmann v. Bowen*, 39 *N. Y.* 196, 198.) 6. The intention of the legislature should control, absolutely, the action of the judiciary; where that intention is clear, the courts have no other duty to perform than to execute the legislative will. The intention is to be discovered in the statute itself, in other laws on the same subject, usage and contemporaneous history. It is not till these means fail, and the legislative intent is hopeless, that courts should assume any power of construing a statute either strictly or liberally. When the meaning is clear, they have no power to make modifications or exceptions. (*Sedgwick on Stat. and Com. Law*, 379.) 7. There is no authority to extend the time to report. A statute establishing a time in which an act shall be done "is unbending, requiring implicit obedience as well from the court as from its suitors. The court possesses no dispensing power." (*Wait v. Van Allen*, 22 *N. Y.* 321. *Humphrey v. Chamberlain*, 11 *id.* 274.)

VI. All the laws under which the city has sought to acquire title to that part of Broadway embraced within the limits of the designed improvement, are contrary to the constitution of the United States, and all the proceedings are void. 1. The fourteenth amendment is: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (Article 14, § 1, amendments to the constitution of the United States, passed June 16, 1866.) The original article read: "No person * * * shall be deprived of life,

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liberty or property without due process of law; nor shall private property be taken for public use without just compensation." (Article 5, amendments.) It was held, that article 5th was only a limitation of the power of the United States, and was not applicable to States. (*Baren v. Mayor, &c.*, 7 *Peters*, 243. *Withers v. Buckley*, 20 *How.* 84.) Hence, no question under the constitution of the United States could heretofore be made against our laws for acquiring land by eminent domain. The effect of article 14 is to limit the power of the States in the same manner that the power of the United States was already limited, and to confirm the States in their exercise of the right of eminent domain to "due process of law." 2. All the cases and elementary writers assume, that compensation must be made for private property taken for public use, under the provision that no person shall be deprived of his property without due process of law. (*Taylor v. Porter*, 4 *Hill*, 146. *See cases collected*, 1 *Abb. N. Y. Digest*, 149, (2).) The direct prohibition is only cumulative, and would have been included by implication in the first part of the 5th amendment. (*See cases above.*) 3. This brings us to the question, what is due process of law? The constitution furnishes the answer. "In suits at common law, where the value in controversy exceeds \$20, the right of trial by jury shall be preserved." (Article 7 of amendments.) The common law alluded to, is the common law of England. (*United States v. Wonson*, 1 *Gall.* 20.) The term "suits at common law," includes all legal proceedings, whatever may be the peculiar form they assume or object they have in view, which are not of equity or admiralty jurisdiction. (*Parsons v. Bedford*, 3 *Peters*, 434, 446. *La Vengeance*, 3 *Dall.* 297. *Webster v. Reed*, 11 *How.* 437.) The term "due process of law," requires a trial by jury. (*Dew v. Hoboken*, 18 *How.* 272. *Matter of Adrian Jones*, 30 *How. Pr.* 446. *Taylor v. Porter*, 4 *Hill*, 140. *Van Horne v. Dorrance*, 2 *Dall.* 304, 312, 315. *The*

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People v. Haws, 37 Barb. 440. *Westervelt v. Gregg*, 12 N. Y. 212. *Bank of Columbia v. Okely*, 4 Wheat. 235, 243, 244.) In this last case, an act of the legislature of Maryland incorporating the bank, gave it a summary process of attachment against its debtors, who, by express consent in writing, subjected themselves to the conditions of the act; and such act was held not repugnant to the constitution of the United States. The court intimates that trial by jury cannot be dispensed with under the 7th amendment to the constitution of the United States, and under the words "due process of law," in the 5th amendment, except where waived by the suitor; and further, that in certain cases the policy of the law would forbid such waiver. This case is no authority for the position of Judge Gilbert. That learned judge misconceived the gist of the argument in supposing that the constitution, before the fourteenth amendment, contained any clause obligatory on the States. In *Taylor v. Porter*, (*supra*.) it was held that the act of 1772, for laying out private roads, was unconstitutional, because the damages were not assessed by a jury. The whole question was fully considered. The words "law of the land," as used originally in Magna Charta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, "is the true sense and exposition of these words." (3 *Story on Const.* § 789. 1 *Kent's Com.* 613.) 4. There is but one case sanctioning the assessment of damages by commissioners instead of a jury. (*Beekman v. Saratoga and Sch. R. R.*, 3 *Paige*, 72.) And in this case, the chancellor was careful to say: "The constitution of the United States does not come in question in this cause." Judge Nelson, who dissented from the opinion in *Taylor v. Porter*, (*supra*.) made the same distinction. (4 *Hill*, 149.) The *dicta* in the cases in this State, holding or implying that the words due process of law do not necessarily import a jury trial,

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were all decided under the peculiar phraseology of the constitution, that "trial by jury in all cases in which it has heretofore been used shall remain inviolate forever." Those authorities do not apply to the constitution of the United States. 5. Article 14, section 1, of the amendments, operates as a repeal of the New York laws permitting commissioners to take lands. The rule is, when a constitution passes taking away the power from the legislature to pass laws on a particular subject, this is equivalent to a repeal of existing laws on that subject. (*Sedgwick on Const. Law*, 597. *Ogden v. Saunders*, 12 *Wheat.* 278, *per Johnson, J.*) Article 6 of the constitution declares that it shall be the supreme law of the land. Amendments to the constitution are always retroactive, in their effect upon other laws. (*Bingham v. Cabot*, 3 *Dall.* 382. *Cohens v. Virginia*, 6 *Wheat.* 405, *et seq.* *Pierce v. Delamater*, 1 *Comst.* 17.)

VII. The majority report is fatally defective in this that the commissioners have adopted a new area of assessment, and not confined themselves to redistributing the sum to be assessed over the area of the former commissioners. All assessments for benefit outside of the area of the former commissioners are void. The two areas, viz., of 1869 and 1871, are shown on the map. To assess property from Waverly place to Twenty-third street, and on Lexington, Fourth, Fifth and Madison avenues, for the improvement of Broadway, between Thirty-fourth and Fifty-ninth streets, is legalized spoliation. This property is absolutely injured by the widening. The area of 1869 omitted all this property. That part of the city which is above Sixty-sixth street, is most benefited, and is not assessed one dollar. The act of 1871 authorized the court, in its discretion, to do one of three things. 1st. To send the old report back to commissioners to amend any specific awards or assessments. 2d. To appoint new commissioners, with power to make a new area and new awards and assess-

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ments, i. e., do the whole thing anew. 3d. To appoint new commissioners to make a new assessment, and leave the area as it was. Judge Cardozo so held. The first two Judge Cardozo refused to do; the latter he did. His order directed "that the said commissioners of estimate and assessment, hereby appointed, shall forthwith proceed to amend and correct the report made to this court on December 28, 1870, and to make a new assessment, in whole, both as to awards for damage and assessments for benefit, &c." The order is explicit; the commissioners are "to amend and correct" an old report, not to make a new one. They were to correct it in certain specified particulars "as to awards for damage, and assessments for benefit." The question of area, was purposely kept from the new commissioners, for the following reasons: 1st. The act of 1869 prescribed a definite area. (§ 2.) 2d. The act of 1871 permitted a different area, but left the whole matter to be done "as the court or justice shall direct." (§ 4.) 3d. The order was made to correct the wrongs complained of, and otherwise left the work of the first commissioners untouched. The first area was universally acquiesced in; it was just. The reasons why the order was set aside, are the frauds that existed in the awards. The order is carefully drawn, and distinguishes between the different duties of commissioners, which may well be done by different persons. 1st. Determining the area. 2d. Distributing the assessments. A familiar instance is the opening of roads and railroads. The filing of a map, or a jury viewing the ground, determines the area, while the damages are assessed by a different process. The order directs a new "assessment." An assessment is defined as "the act of fixing the amount of damages." Read in this way, the order is reasonable. As the commissioners interpret it, it is meaningless. If they had power to make new awards, new assessments and a new area, they could do all that an original com-

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mission could do, and all allusion to "amending and correcting" the report, and the limitation of the new assessments to "awards for damage and assessment for benefit" is meaningless. If this was intended, why was not the usual order to establish an area, to estimate, assess and report, &c., entered?

VIII. The appointment of commissioner Wood was invalid, because made without notice. (*Valentine's Laws*, p. 1223, § 2.)

IX. The minority report and the minutes form part of the record. By the act of 1813 commissioners were not obliged to file any of the papers they used, but only their report. (*Valentine's Laws*, p. 1201, § 182.) This enabled commissioners to conceal frauds and irregularities, and to meet this evil, in 1839, an act was passed requiring the commissioners to file an abstract of their report, their map and "also all the affidavits, estimates and other documents which were used in making their report." (*Valentine's Laws*, p. 1224, § 4.) Any person might object to the abstract so filed, and present statements and affidavits against it, and it is made the duty of the commissioners to transmit to the court all such statements and affidavits. (*Idem.* § 5.) The words, "other documents," in the act of 1839, include the "minutes of the commissioners' meetings" and the minority report. The act of 1862 specifies some of these "other documents," as being "maps, profiles, boundary lines, diagrams, abstracts, surveys and minutes of the proceedings." (*Valentine's Laws*, p. 1232, § 5.) It is absurd to say that a commissioner appointed by the court to do a particular act cannot report what has been done, to the court appointing him. He is bound to do so; it is his duty. Mr. Hennessy did so report to the special term. Mr. O'Gorman himself presented this report with the majority report. The court received the minority report, and argument was had, and a judgment and opinion given based upon it. It is too

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late to object that it forms no part of the record. A minority report was received in *The Water Commissioners v. Lansing*, (45 N. Y. 20.)

X. Where by one proceeding lands are taken and assessments are laid, the whole is to be deemed an exercise of the right of eminent domain. The assessments go to pay for the land. The cases cited on the right of taxation are inapplicable. The objection is to the widening *in toto*. Any one who is assessed for benefit may object to the report, for it throws a burden on him. (*Matter of Thirty-ninth street*, 1 Hill, 191. *Coles v. Trustees &c.*, 10 Wend. 659.)

XI. The assessments on the appellant's lands should be vacated. If this cannot be done, the whole proceeding should be vacated.

Richard O'Gorman and *A. J. Vanderpoel*, for the respondents.

By the Court, LEARNED, J. The general term, before which this matter came, was composed of one of the justices assigned to the general term in the first department and two justices from another district. The two other justices assigned to the general term in the first department were, by reason of interest, incapable of sitting on the appeal. The appellant objected that under section 10, chapter 408, laws of 1870, the appeal *must* be sent to some other department.

First, In construing such a statute, its general meaning is to be considered. The object of the legislature was to provide a court competent to hear appeals in every case. Section 4 of the same act provides for the calling in of other justices. And, as all the justices of the Supreme Court have co-ordinate authority throughout the State, the statute referred to is only an assignment of some to a special duty. None of the justices actually holding this general term were incapable of sitting on this appeal. It

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seems to be an unreasonable construction to say that because two justices who are *not* holding court are incapacitated from acting, therefore the three who are holding court, and who are not interested in the matter, shall not act. It can hardly make much difference whether the appeal goes to another department, or another department comes to the appeal.

Second. The next objection is that the report was signed by only two of the commissioners. The case of *Water Commissioners v. Lansing* (45 N. Y. 19,) holds that in the case then under consideration, all of three commissioners must have been present when they rendered their decision. The case arose on the language of chapter 177, laws of 1856, as amended by chapter 744, laws of 1868. Those laws do not contain the peculiar provision, found in the act of 1813, under which the commissioners were appointed in this case. That act expressly authorizes two of the commissioners to act, and declares that their acts shall be as valid as the acts of all.

It is urged by the appellant that this provision is abrogated by the constitution of 1846, art. 1, sec. 7. That section requires compensation to be ascertained by a jury, or by not less than three commissioners. But in the case of *Cruger v. H. R. R. R.* (12 N. Y. 190,) it was held that, notwithstanding this constitutional provision, the legislature might authorize a decision by a majority of the jury appointed in such cases. And if the legislature can authorize a majority of a jury to decide, why can they not authorize a majority of the commissioners to do the same thing? The cases are so nearly analogous, that we are bound by that decision. This, too, was the decision in the *Church street case*, (49 Barb. 458.) The circumstances were very different in the *Backman case*, (1 Abb. N. S. 451,) in which a contrary rule might seem to have been adopted.

Third. An objection is made that all the proceedings are contrary to the fourteenth amendment of the constitution

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of the United States. This objection has been overruled in another case before the general term of this department, and it is not, therefore, necessary to examine it here.

Fourth. The provision requiring the report to be made within six months was not complied with. But we agree with the learned justice, whose order is appealed from, that this was to be deemed merely directory. It was not a matter of jurisdiction. The proceeding was properly in the Supreme Court. The commissioners were only officers of the court, and the jurisdiction was not lost by the delay.

Fifth. An objection is taken that the provision in the fourth section of chapter 57, laws of 1871, by which a majority of the new commissioners were required to be other than the former commissioners, was unconstitutional. The ground is, that the constitution has confided the power of appointing commissioners to the court. And it is urged that the judge who made the appointment, construed the act as requiring him to appoint one of the former commissioners. It does not seem that the judge considered this imperative. Even if he did so consider it, an erroneous construction could not make the law unconstitutional. The law does not positively require the appointment of any one of the former commissioners. It excludes two of them from the appointment. Now, the exclusion of two men out of all the competent inhabitants of the State (or, at least, of the city) cannot, in any reasonable sense, be construed as a violation of the constitutional provision giving the appointing power to the court. It is a most common practice to exclude from a jury one who has, as a juror, heard the case tried before. If the statute had provided that no convicted felon should be appointed commissioner, would any one say that such a restriction was unconstitutional? Constitutions are to have a broad, not a petty construction. (*People ex rel.*

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Potter v. Jackson, 47 N. Y. 375. *People v. Fancher*, not reported.)

Sixth. It is objected that the commissioners have adopted a new area of assessment. The act of 1871 authorized the court to vacate the order of confirmation, and to refer the matter back to commissioners. It directed the commissioners to amend and correct said report, or to make a new assessment, in whole or in part, as the court should direct. The order granted April 3, 1871, vacated the order of confirmation, and directed the new commissioners to amend and correct said report, *and* to make a new assessment in whole. The act further authorized the commissioners, in making such corrected or new assessment, to assess any and all property which they deem benefited, and repealed the former limitation. Whatever then the language of the order was, the act is plain. The commissioners could go beyond the former area.

Seventh. It was objected that no notice was given of the motion for Mr. Wood's appointment. The court had acquired jurisdiction of the proceedings by the original publication of the notice. The act of 1871 authorized the court to refer the matter back to new commissioners. This was to be done on the vacating of the former order of confirmation upon a five day's notice. (§ 6.) The court having under this act appointed commissioners, and one of them having declined to act, it seems plain that the same court had power to supply his place. Want of notice could be only an irregularity.

Eighth. As to the objection that the land of one of the appellants was disproportionately assessed, the court cannot entertain it. That was a matter for the commissioners. (*Central Park*, 16 Abb. 56.)

Ninth. The appellant Sacchi, a lessee of certain premises, claims that he should be allowed for certain damages and loss of rents and profits arising out of his sub-letting. It is not disputed that the value of the lands was awarded

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to the landlord, and the value of the buildings thereon was (according to the provisions of the lease) awarded to Mr. Sacchi. This, then, makes the total value of the property. When the city pays for the land all that it is worth, and for the buildings all that they are worth, then, certainly, nothing more can be asked.

Among the papers on the appeal is what is called a minority report. To prevent misapprehension we may say, in passing, that we do not think any such paper can properly come before the court. There can be only one report, and that is the report of the whole, or a majority, of the commissioners. It may be doubted whether one who is only assessed and whose property is not taken, is in a position to assert several of the objections above mentioned. But we do not deem it necessary to decide that point.

The order appealed from should be affirmed, with costs.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 4, 1872.
Leonard, Learned and Danforth, Justices.]

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DENNIS QUINN *vs.* THE MAYOR, ALDERMEN AND COMMON-
ALTY OF THE CITY OF NEW YORK.

The plaintiff, at the charter election in December, 1869, was elected to the office of justice of the district court in the city of New York, for a term to commence on the 1st day of January, 1870; and on that day he entered upon the duties of the office. At that time, the salary of a police justice, as fixed by a resolution of the common council, adopted December 31, 1869, under the supposed authority of law, and as paid, was \$10,000 per annum; and this was the specified salary paid to a police justice when, in April, 1870, an act was passed by the legislature, providing as follows: "The mayor and comptroller are hereby authorized to fix the salaries of the civil justices of the city of New York, or any of either of them, as they may deem the legal business of the respective districts to justify, *not exceeding the*

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salary now paid to the police justices of said city." On the 21st of October, 1870, the mayor and comptroller, in pursuance of the authority given by this act, fixed the salary of the plaintiff, as such civil justice, at \$10,000. *Held* that whether the ordinance of December 31, 1869, by which the salary of each of the police justices was fixed at \$10,000, was legal and valid, or not, it having been adopted under the supposed authority of law, and \$10,000 being the sum paid to police justices at the time of the passage of the act of April, 1870, and the mayor and comptroller not having exceeded that limit by their action in fixing the salary of the plaintiff, on the 21st of October, 1870, their official act was valid, and in accordance with law.

Held, also, that it was plain that the legislature, by the act of April, 1870, meant to grant to the mayor and comptroller a discretion to fix the salaries of the civil justices at any amount not exceeding the sum *then paid* as salary to a police justice; and that it was therefore vain to assert that the salaries of the police justices had been *unlawfully* fixed at \$10,000 per annum; that not being the question, but rather, what were the sums *then paid*, as such salaries.

Held, further, that the city was liable for the plaintiff's salary, at the rate of \$10,000 per year, though the board of apportionment had failed to provide for its payment, and the city corporation set up as a defence that there was no money in the treasury appropriated or applicable to the payment of such salary.

The act of the board of apportionment, in setting apart or appropriating a certain sum for the payment of the salaries of the district court justices, for a particular year, which sum thus appropriated is less than the aggregate amount of such salaries as lawfully fixed, is not a "regulation" of such salaries, so as to change the amounts of the salaries as already fixed.

Before the board of apportionment can change the amount of a specific salary, they must act directly on the question of the amount of the salary, and explicitly make the change.

The change or regulation of the salary to a different sum will not be inferred from the indirect action of the board in setting apart an aggregate amount to meet the payment of the same and similar salaries.

The district court justices of the city of New York are not attached to any of the "departments" of the city; nor is the salary due to one of them, already fixed by competent authority according to law, before the passage of the act of 1872, (*Laws of 1872, ch. 9*.) a liability incurred by him. In other words, the salary of a district court justice, lawfully fixed prior to 1872, which may fall due during that year, is not a liability *incurred* by that officer, against the prohibition of the law of 1872.

The act of the legislature, of April 19, 1871, (*Laws of 1871, ch. 583*.) which provides that "no liability for any purpose whatever shall be *hereafter* incurred by any department of the city of New York, or officers of the county of New York, exceeding in amount the appropriations made for that purpose," is not unconstitutional. The act is prospective, and its provisions

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are not to have a retroactive effect. Whatever valid contracts or liabilities of the city existed at the date of its passage, continue to exist, and are not abrogated by the act.

DEMURRER to answer. The plaintiff was elected justice of the first district court of the city of New York, and entered upon his six years term of office January 1, 1870. His salary was fixed by the mayor and comptroller at \$10,000 per annum, and was paid, at that rate, up to September, 1871. Subsequent to that date, the plaintiff's salary was paid at the rate of \$5000 per annum; and this action was brought to recover the balance claimed to be due.

The answer of the defendants, verified by Andrew H. Green, comptroller of the city of New York, denied that the salary of the plaintiff was fixed at \$10,000 per annum, and alleged, as a second defence, that there was no money in the city treasury appropriated or applicable to the payment of the plaintiff's salary at the rate of \$10,000 per annum.

The answer did not deny any of the material facts set out in the complaint. The plaintiff demurred to the answer, on the ground that the facts stated therein were not sufficient to constitute a defence.

The facts are fully stated in the opinion of the court.

A. R. Lawrence, for the plaintiff.

D. J. Dean, for the defendants.

FANCHER, J. The plaintiff, at the charter election in December, 1869, was elected to the office of justice of the district court in the city of New York, for the first judicial district of said city, for the term of six years from the first of January, 1870, and he entered upon the duties of the office on that day, and has since then continued to perform the same.

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This action is brought to recover for the salary of the plaintiff, as such civil justice, from the first of September, 1871, to the 31st day of May, 1872, at the rate of \$10,000 per annum. The first and second demands of payment, required by law, were made upon the comptroller, and he refused to pay the claim.

The answer of the defendants, verified by the comptroller, as chief financial officer of the city, denies that the salary of the plaintiff is at the rate of \$10,000 per annum; alleges that it is fixed by law at \$5000 per annum, and offers to allow judgment at the latter rate. For a second defence the answer alleges that there is no money in the treasury of the city appropriated or applicable to the payment of the salary at the rate of \$10,000 per annum; and finally sets up that on and since the first of October, 1871, there was no money in the treasury so appropriated or applicable.

To this answer the plaintiff has demurred, and the question is whether the answer states any lawful defence to the action.

1. The first question which arises on these pleadings is, whether the salary of the plaintiff is lawfully fixed at \$10,000 per annum, or at the lesser sum of \$5000 per annum. Chapter 308 of the laws of 1864 provides, that the justices and clerks of the district courts shall receive an annual compensation to be fixed by the board of supervisors. The complaint sets forth this provision of law, and alleges that on the 31st day of December, 1864, an ordinance or resolution was adopted by the board of supervisors, and approved on the same day by the mayor, fixing the compensation of the said justices at \$5000 per annum, payable monthly. The complaint sets forth the provisions of law, which authorize the common council or board of supervisors to increase the compensation of certain officers, including police justices; and alleges that on the 31st of December, 1869, the common council passed an ordinance

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fixing the compensation of each of the police justices, at \$10,000 per annum; and that compensation was thereafter paid to them at that rate, and was so paid when chapter 383 of the laws of 1870 was enacted.

The last enactment reads as follows:

“The mayor and comptroller are hereby authorized to fix the salaries of the civil justices of the city of New York, or any or either of them, as they may deem the legal business of the respective districts to justify, *not exceeding the salary now paid to the police justices of said city.*”

It is conceded that the salary then paid to each police justice, under the color of the authority of law, and within the literal scope of the language of the legislature and of the common council, was \$10,000 per annum; but it is contended that the common council had no lawful authority to increase such salary to that sum.

Whether the ordinance of the common council of the 31st of December, 1869, by which the compensation of each of the police justices was fixed at \$10,000 per annum, was legal and valid, or not, it is certain that it was adopted under the supposed authority of law. Chapter 508 of the laws of 1860, contains the supposed authority, and provides that “the common council or the board of supervisors in said city and county may increase the compensation of any officer mentioned herein,” and police justices are officers mentioned in the act.

When this plaintiff entered upon the duties of his office, the salary of a police justice, as fixed by resolution of the common council, and as paid, was \$10,000 per annum, and this was the specified salary paid to a police justice when, in April following, chapter 383 of the laws of 1870 was passed. Now when the legislature by that act declared that the mayor and comptroller are thereby authorized to fix the salaries of the civil justices of the city of New York, or any or either of them, as they may deem the legal business of the respective districts to

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justify, not exceeding the salary then paid to the police justices of said city, what did the legislature mean? It is plain they meant to grant to the mayor and comptroller a discretion to fix such salary at any sum not exceeding the sum *then paid* as salary to a police justice. It is in vain to assert that the salary of the police justice had been unlawfully fixed at \$10,000 per annum. That is not the question; but rather what was the sum *then paid* as such salary? Unquestionably the sum was \$10,000 per annum, and, right or wrong, it was being paid under color of the authority of law. The act of 1870 does not refer to any law fixing the salary of a police justice, nor does it contain any language by which the act can be construed to mean the lawfully fixed salary of the police justice. On the contrary, the expression of the statute is, "not exceeding the salary *now paid* to the 'police justices of said city.'"

On the 21st of October, 1870, the mayor and comptroller of the city, in pursuance of the authority of chapter 383 of the laws of 1870, fixed the salary of the plaintiff, as such civil justice at \$10,000 per annum, and signed a certificate to authenticate such action. They must, at that time, have supposed that their official act was valid and in accordance with law, and I can see no reason to suppose that it was not legal and valid.

It is said that when the common council, on the 31st of December, 1869, increased the salary of a police justice from \$5000 to \$10,000, they acted in violation of law, because chapter 876 of the laws of 1869, which was then in force prohibited the common council from creating any new office or department, or increasing the salaries of officials then in office.

Suppose this objection as to the want of power of the common council to increase the salary of a police justice to be well taken. Does it overthrow the fact that the common council did pass an ordinance to increase such

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salary to \$10,000 per annum, under which it *was paid* at that rate? The fact is, such an ordinance was passed, and from that time to the passage of the act of 1870, and the granting of the certificate of the mayor and comptroller above mentioned, the sum *then paid* as salary to the police justice was \$10,000.

Whether the police justice got his salary lawfully or unlawfully, the amount *then paid* him therefor, under color of lawful authority, was \$10,000 per annum. This *sum*, then, is the standard up to which the mayor and comptroller had a right, under the act of 1870, to go, when they fixed the salary to be paid to the civil justices of the city. This standard was the limit beyond which they had no discretion, and since they have not exceeded it, I think their action was legal. When courts are construing a statute with a view to its proper interpretation, the chief thing sought for is the thought expressed by the language of the statute. (*Newell v. The People*, 7 N. Y. 97.) It is clear that the thought expressed by the language of the act of 1870 is a graduation of the salaries of the civil justices according to the discretion of the mayor and the comptroller, up to, but not above, the standard which was marked by the sum then paid for salary to a police justice. The idea that such sum was illegally fixed, could not, when the act of 1870 was passed, have entered the mind of the legislature, for the point had not been raised. If the salary of a civil justice in New York is not fixed at the proper amount, the remedy must be sought in the proper place, and not in the court, which cannot make law, but is only authorized to interpret and administer it.

2. The second defence set up by the answer is that there is no money in the treasury of the city appropriated or applicable to the plaintiff's claim at the rate of \$10,000 per annum.

Chapter 583 of the laws of 1871, p. 1268, is relied upon as supporting this defence. It is claimed that this act,

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commonly called the "two per cent" act limits the amount to be raised by the board of supervisors, by taxation, for the year 1871, and that the board of apportionment, after providing for the principal and interest of certain bonds, and the city's proportion of the State tax, shall apportion the remainder of such aggregate amount "to the various departments and purposes of the city and county governments;" and that from the sum so raised "all the expenses of the city and county for all their departments and purposes shall be paid, and *no liabilities shall be incurred for any purpose in excess of such amount.*" (§§ 1-3.)

It is further claimed that by said act the board of apportionment has power "*to regulate the salaries of officers and employees of the city and county governments.*" (§ 3.)

The 5th section of the same act is relied on, which provides that "*no liability for any purpose whatsoever shall thereafter be incurred by any department of the city of New York, or officers of the county of New York, exceeding in amount the appropriations made for such purpose; nor shall the city or county of New York be held liable for any indebtedness so incurred.*"

The civil justices are not attached to any of the "departments" of the city government; nor are they officers or employees of any of those "departments." This will be evident by a reference to the charter of 1870, (1 *Laws of 1870, chap. 137, p. 366,*) which defines what are the co-ordinate departments of the city government, and how they are constituted. The civil justices are elected by the electors of the district in the manner prescribed by law. (*Laws of 1857, chap. 344, p. 707, § 5. Laws of 1865, chap. 688, p. 1398, § 8.*) But although not attached to any of the "departments" of the city government, still the justices of the district courts in the city of New York are entitled, by law, to have their salaries paid by the city. This is not disputed. When, therefore, the board of apportionment met to dispose of the moneys raised under

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the "two per cent" act, they well knew that the salaries of the district court justices were to be provided for. Those salaries were then legally fixed at \$10,000 each; at least the salary of the plaintiff was fixed at that sum. It is not asserted that out of the sum capable of being apportioned, provision could not have been made for the payment of these salaries and for all other purposes of the city and county government, by the board of apportionment, nor that to have done so would have required the board of apportionment to exceed the expenditure allowed by law. It is only asserted that the board of apportionment *did not*, under the act of 1871, appropriate or make applicable to the payment of the plaintiff's salary any sum above \$5000 per annum. If this be so, the board has provided for half of the salary of the plaintiff accruing during 1871, and left the other half unprovided for. What are the plaintiff's rights under that state of facts?

It is contended for the defendants, that by virtue of the statute, (*Laws of 1871, chap. 583, § 5.*) no expense can be incurred for 1871 in excess of the appropriations made by the board of apportionment; that neither the city nor county of New York can be held liable for any such excess of indebtedness so incurred; that no legal claim, therefore, can exist for salary or other expenses incurred in excess of the appropriation; (*Donovan v. The Mayor &c., 33 N. Y. 291*;) and that no judgment can be recovered in such case unless it appears that there is money in the treasury applicable to the payment of the claim. (*Laws of 1867, chap. 586, § 6. Tribune Association v. The Mayor, 48 Barb. 240.*)

If, as we have seen is the case, when chapter 583 of the laws of 1871, was passed, the salaries of the justices of the district courts of the city were fixed at \$10,000 each per annum, and, if when the board of apportionment had made the appropriations thereunder for 1871, whether they exhausted all the fund at their disposal, or not, they

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had allowed to the district court justices, for their salaries, but one half of what they were entitled to receive, then it is clear that one half the sums due the justices, for their salaries would still be due to them above such appropriations. Can the city escape liability therefor, under shelter of the act of 1871? Was that act intended to abrogate existing lawful contracts or liabilities of the city? It should not be construed to have such an effect unless it be necessary; and I think no such necessity exists. Suppose that in January, 1871, prior to the act, a contract had been duly made by the city with a timber dealer for supplying, during that year, a specified amount of certain timber, for repairing docks, or other lawful use, and that the contractor, faithful to the contract, had delivered all the timber, during the year, and thus performed the contract on his part, but from some omission or design the board of apportionment had not appropriated sufficient moneys, according to the "two per cent" act, to pay for the timber, though the city received and used it all. Can it be pretended that the effect of the act is to deprive the contractor of his due, and that no "*legal claim*" could exist against the city therefor? If such is the effect of a proper interpretation of the act, it does not require argument to show that it is unconstitutional and void. I think the act is not obnoxious to such an interpretation. A more reasonable construction is possible. The act is prospective, and its provisions are not to have a retroactive effect. Whatever valid contracts or liabilities of the city existed at the date of its passage, continue to exist, and are not abrogated by the act. The language of the act of 1871, § 5; is "no liability for any purpose whatever shall be *hereafter* incurred by any department of the city of New York, or officers of the county of New York exceeding in amount the appropriations made for such purpose." The plaintiff's claim is not a liability incurred by any "department" of the city, nor by any officer of the

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county, nor was it incurred after the act. On the contrary, it is a liability imposed on the city by the people in their sovereign capacity through the act of the legislature which requires the city to pay the salaries of the district court justices, and the liability was incurred before the act of 1871, and when the plaintiff assumed his office.

It may be true, that in respect of expenses for purposes of city or county government incurred after the passage of the act, no liability therefor could be incurred by the city in excess of the amounts appropriated by the board of apportionment. After the act was passed, parties contracting *with the city* were advised of the provisions of the act and could refrain from contracting, so as to protect their rights, but parties who had become bound by contract, or by election and oath of office, prior to that time, could have no such advice or opportunity, and they would be entrapped and defrauded if the act be held to be retrospective and applicable to them. The plaintiff entered upon his office prior to the passage of the "two per cent" act; he took his oath of office prior to that time, and when the act was enacted, he was bound, in law and conscience, to continue to perform the duties of his office for the term for which he was elected, and he could not withdraw from the obligation. Neither law nor justice will, I think, permit the city to withdraw from its correlative obligation imposed upon it by law. It is liable for the plaintiff's salary at the rate of \$10,000 per year, though the board of apportionment has failed to provide for its payment.

The case of *Donovan v. Mayor of New York*, (33 N. Y. 291.) cited by the defendants' counsel, holds that where municipal officers act without authority in making a contract, the city will not be liable. Of course, if a party act in contravention of the policy and terms of a statute, he cannot invoke the aid of the courts to enforce an unlawful agreement. But, what has this plaintiff done in contra-

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vention of any law, or what illegal duty has he undertaken. His office and duty as district justice are precisely within the express terms of law, and the principle of the case in 33 *N. Y.* does not seem to me to be applicable to him. He would have been guilty of violation of both law and duty, had he refrained from exercising the functions of his office. Nor does the case of the *Tribune Association v. The Mayor &c., of New York*, (48 *Barb.* 240,) affect the right of this plaintiff to recover for his salary. Under the statute of 1866, (*vol.* 2, *p.* 2070, § 10,) the general term of the first department, held that no judgment in actions upon contract could be entered by default or otherwise against the corporation of New York, except upon proof in open court, that the amount sought to be recovered remained unexpended in the city treasury, to the credit of the appropriations to the specific object or purpose upon which the claim sued for is founded, and that the statute affected the remedy, and not the contract, forasmuch as it prohibited the entry of a judgment until the appropriation was made. The court said the act "is not applicable to actions, but to judgments."

An examination of the provisions cited from the 10th section of the act of 1866, with the entire context of the section, and with the other sections of that act, will show that the restriction as to the entry of judgments against the city, contained therein, is applicable only to the liabilities of 1866, and respects only the appropriations made under that act, for the liabilities of that year. The consequences of holding that all of the liabilities for all time, against the city, shall not exceed the sum appropriated by that act for the purpose, would be so absurd that no one will be found to contend that the restriction against rendering judgments applies to any claims or liabilities except those of the year 1866. This construction is favored by the express language of the similar act of the succeeding year, (2 *Laws of* 1867, *p.* 1606, § 6,) which, in

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express terms, limits the restriction as to the entry of judgments by default or otherwise against the corporation of New York to that particular year, and it is not extended to judgments generally.

But it is argued that chap. 583, of the act of 1871, § 3, authorized the board of apportionment to regulate all salaries of officers and employees of the city and county governments, and forasmuch as the board have only appropriated money to pay the salaries of the district court justices for 1871, at the rate of \$5000 per annum, therefore those salaries are thus lawfully regulated. It may be questioned whether the officers thus referred to include judicial officers. The term certainly does not include State officers who derive their office from the general laws of the State, and whose duties are not by law limited to the city and county of New York. Yet, assuming that the language just quoted is broad enough to embrace district court justices, whose salaries are paid by the city, there is this sufficient answer to the argument that the salaries have been changed by the board of apportionment. The act of the board of apportionment in setting apart or appropriating a certain sum for the payment of the salaries of the district court justices for 1871, which sum thus appropriated is less than the aggregate amount of such salaries as lawfully fixed, is not a regulation of such salaries so as to change the amounts of the salaries as already fixed. Before the board of apportionment can change the amount of a specific salary, they must act directly on the question of the amount of the salary, and explicitly make the change.

The change or regulation of the salary to a different sum, will not be inferred from the indirect action of the board in setting apart an aggregate amount to meet the payment of the same and similar salaries. . It does not appear but that other moneys were at the command of the board, which could be appropriated to the purpose, nor

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that the board intended to make no further appropriations for this purpose.

They have the express power by the 3d section of chapter 583, of the act of 1871, (as the comptroller has by chapter 9, of laws of 1872,) to "transfer appropriations which are found to be in excess of the amount required or deemed to be necessary, to such other purposes as they shall find to require the same." This language implies that some of the appropriations made would be insufficient for the purposes for which they were made, and is potential in argument to show that an appropriation unequal to the purpose of paying certain fixed salaries, was not a regulation or reduction of the salaries to the standard of the first appropriation. If there is not money in the city treasury sufficient to meet the payment of these salaries, it is not the fault of the law. There is sufficient lawful authority to raise the amount necessary, under chapter 583 of the laws of 1871, and chapters 9, 29 and 444 of the laws of 1872. The board of apportionment and audit can provide for the claims, and until the revenues from taxation are received, the comptroller can issue bonds to cover all the deficiencies in respect of these salaries and the salaries of any judicial officers. It is not competent for the financial department of the city to say, "there is no money in the treasury to meet the claim," when the financial department and the board of apportionment and audit themselves, might supply the deficiency. The claim is lawful and honest; there is abundant lawful power to raise the money to provide for it, and if the board of apportionment and audit and the comptroller refuse or neglect to take the proper action to make such provision, then the remedy of the plaintiff is to establish his claim by a judgment, and to collect it by an execution.

It is contended that because the legislature by chapter 9 of the laws of 1872, provided for a board of apportion-

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ment and audit, and gave to the board, power to make an estimate of the amounts required to defray the expenses of conducting the public business of the city and county of New York, for 1872, the plaintiff should file his claim with such board. When that board made their estimate for the year 1872, they should have included the plaintiff's salary with the amount required to pay the salaries of other judicial officers. Under chapters 29 and 444 of the laws of 1872, they could have made new estimates. It appears from the answer that the board has failed of its duty in this particular. The answer makes out that an amount is in the treasury sufficient to pay the plaintiff's salary at the rate of \$5000 per annum, and not more. Is the city to escape its liability, or the plaintiff to lose his salary, because of this failure of the board of apportionment and audit? No such consequences should follow. If the board will not do what justice and law require, and what it might do to pay the just claims against the city, then the city must not only respond to its just liability, but be subjected to the costs of a litigation it should have avoided.

Chapter 9 of the laws of 1872, declares that "it shall be the duty of such departments and officers (that is the departments of the city and the officers of the county of New York) to regulate expenditures so that they shall not exceed the appropriations made by said board for the period aforesaid, and no liability for any purpose whatever, shall, during the period aforesaid, be incurred by any officer or department within said city and county beyond the appropriation so made."

As already remarked, the district court justices of the city are not attached to any of the "departments" of the city; nor is the salary due to one of them, already fixed by competent authority according to law, before the passage of the act, a liability incurred by him. In other words, the salary of a district court justice, lawfully fixed

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before 1872, which may fall due for and during that year, is not a liability *incurred* by that officer against the prohibition of the law of 1872.

I do not think any lawful defence to the plaintiff's claim is set forth in the answer in this action; and judgment should be ordered against the defendants for the amount of his claim, with costs, and five per cent allowance.

Judgment is ordered accordingly.

[NEW YORK SPECIAL TERM, December 2, 1872. *Fancher*, Justice.]

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**BRETT and others vs. THE FIRST UNIVERSALIST SOCIETY
OF BROOKLYN.**

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The omission, by a defendant, to plead the appointment of a receiver of the plaintiffs' assignor, in proceedings supplementary to execution, prior to the assignment by him to the plaintiffs, of the demand in suit, will uphold a decision of the referee excluding evidence of the supplementary proceedings and the appointment of a receiver.

The ownership of the demand in suit by the receiver should be affirmatively stated, in the answer. Evidence of that fact cannot be introduced to sustain a denial that the demand has been assigned to the plaintiffs and that they are the owners thereof.

In a suit brought by the assignees of a demand, perhaps evidence tending to show that the assignment was without consideration, or that the assignor has made no valid transfer, is admissible to sustain a denial that the demand has been assigned to the plaintiffs and that they are the owners; but not to prove the ownership of the demand by a third party. *Per LEONARD, P. J.*

The power of amendment being given to referees, with large discretion, the court will not disturb a judgment for a refusal of a referee to allow an amendment of an answer, so as to admit evidence of a defence not set up therein, after a lapse of five years since the matters sought to be introduced occurred.

At a meeting of a religious society, B., the treasurer, being present, the pastor stated that he was authorized by B. to say to the society that there was a large deficiency in the revenues; that his accounts were not made up, and he could not state the exact amount; but that if \$2300 was raised, he, B.,

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would accept it in full settlement of his accounts against the church. The society was then called upon for subscriptions, and the required sum was raised and paid to B. *Held* that this was a good accord and satisfaction. And that the payment of \$2300, on behalf of the society, to B., under an agreement that it should be received in satisfaction of a demand uncertain in amount, operated as a full and final release of such demand. Where, although there was evidence of an accord and satisfaction, on the trial before a referee, yet the referee refused to find the fact, because the defence was not set up in the answer; *Held* that it was the duty of the referee to decide the case according to the evidence; and that the pleadings must be deemed to have been amended so as to include that evidence.

APPEAL, by the defendant, from a judgment entered upon the report of a referee.

The action was brought by Martin W. Brett, James E. Brett and Gustavus A. Brett, constituting the firm of Brett, Son & Company, and Lyman B. Carhart, as trustee of the estate of Joshua Gier, deceased, against the defendant, to recover the balance of an account due from the defendant to one Caleb Barstow, as treasurer of the defendant, under assignments from Barstow to the plaintiffs.

The complaint alleged, 1st. That the plaintiffs, Martin W. Brett, Jas E. Brett, Gustavus A. Brett, were, at the times hereinafter mentioned, copartners, constituting the firm of Brett, Son & Co., of the city of New York. 2d. That the plaintiff, Lyman B. Carhart, was, on or about the 23d day of January, 1868, duly constituted, and ever since has been, and now is, the trustee of the estate of Joshua Gier, deceased. 3d. That the defendant is a religious corporation, formed under and pursuant to the laws of the State of New York, whose place of residence or location is in the city of Brooklyn. 4th. That from some time, in the year 1861, up to some time in the year 1864, (but the precise dates the plaintiffs are not informed of and cannot state,) one Caleb Barstow was the treasurer of the defendant, and as such received and disbursed the funds of the defendant, and divers other funds and moneys of his own were by him, during said period, advanced and

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paid out in and for the business and purposes of the defendant, and at the request of the defendant, and that such advances so made by said Barstow prior to and up to the 1st of November, 1864, amounted, over and above all sums received from or for account of defendant by him prior to that date, to the sum of \$4550.02, no part or portion whereof has since been paid by the defendant. 5th. That on or about the 1st of November, 1864, said Caleb Barstow and said defendant came to an accounting together at said city of Brooklyn, of and concerning the moneys so paid out and received by said Barstow up to that date upon an account in writing then and there made and rendered by said Barstow to said defendant, wherein and whereby said defendant was found to be indebted to said Caleb Barstow in the sum of \$4836.62, for moneys paid out by said Barstow prior thereto, and for account and at the request of said defendant, over and above all moneys received by him for its account, which account the defendant accepted, and approved and agreed to its correctness, and promised to pay the same. 6th. That said Caleb Barstow, on the 12th day of July, 1864, at said city of Brooklyn, paid for account and at the request of the defendant, as such treasurer, the sum of \$114.13, which was inadvertently omitted from said account made and rendered as aforesaid, and on or about the 1st of November, 1864, he paid for account and at the request of the defendant, the further sum of \$1700. 7th. That said Barstow, in making up said account rendered as aforesaid, also inadvertently omitted to enter and charge therein interest upon the sum of \$3501.04, being the balance brought forward from his previous account against the defendant, to wit, from the 12th day of October, 1863. to the 1st day of November, 1864, being the sum of \$245.07, which sum should have been added to the balance due him as aforesaid in said account. 8th. That said several sums have

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not been paid, nor either of them, except the aggregate sum of \$2345.80 thereof, paid between March 6, 1865, and November 2, 1865, at dates averaging as one payment on the 21st of June, 1865. 9th. That said Caleb Barstow, prior to the commencement of this action, duly and for value, assigned and transferred to the plaintiffs his claim and demand and his right of action therefor against the defendant for the matters aforesaid, and the plaintiffs are now the lawful owners and holders thereof. Wherefore the plaintiffs demanded judgment against the defendant for the sum of \$4550.02, with interest upon \$5081.69 thereof from the 1st of November, 1864, and on \$114.13 thereof from July 12, 1864, and on \$1700 thereof from November 1, 1864, less interest on \$2345.80 from June 21, 1865, besides costs of this action.

The defendant, by its answer, admitted that it was a religious corporation organized under the laws of the State of New York; that from some time in the year 1861, to the month of December, 1863, Caleb Barstow was the treasurer of the defendant, and as such received and disbursed the funds of said corporation; but denied each and every other allegation in the amended complaint contained.

The action was referred to a referee

On the trial before him, the defendant offered to prove that prior to the assignment of the demand in suit, by Barstow to the plaintiffs, in proceedings supplementary to execution against him, a receiver of Barstow's property was appointed. The counsel for the plaintiffs objected to the admission of said order in evidence, that the proof was not admissible under the pleadings, and also upon the ground that the order appeared to have been made at special term, and that the court had no power to appoint a receiver in proceedings at special term; that it must be done by the justice. The referee sustained the objection,

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and the counsel for the defendant excepted. The defendant's counsel also offered in evidence the receiver's bond, dated the blank day of November, 1866, and approved by the judge, and asked the question, "Was Mr. Barstow examined on this proceeding, and was his examination signed by him?" The counsel for the plaintiffs objected to the question. The referee sustained the objection, and the counsel for the defendant excepted thereto. The defendant's counsel offered the examination of Caleb Barstow in evidence, which was sworn to on the 9th of November, at the time of making the order signed by the judge. The plaintiffs' counsel objected. The referee sustained the objection, and the counsel for the defendant excepted.

The referee found the following facts :

First. That the plaintiffs, Martin W. Brett, Gustavus A. Brett and James E. Brett, were, at the times mentioned in the complaint, copartners constituting the firm of Brett, Son & Co., and that on the 23d day of January, 1868, the plaintiff Lyman B. Carhart was duly constituted, by a decree of this court, a trustee of the estate of Joshua Gier, deceased, and duly accepted said trust and acted thereunder.

Second. That the defendant is now, and was at the said time, a religious corporation, organized under the laws of this State, resident in the city of Brooklyn, Kings county, in this State.

Third. That during the period hereinafter mentioned, Caleb Barstow was the treasurer of the defendant, and as such received and disbursed its moneys, and also disbursed moneys of his own in and about the business of the defendant, and at the request of the defendant.

Fourth. That on the 12th day of October, 1862, there was due to the said Caleb Barstow from the defendant for moneys so paid out by him for the defendant, over and

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above all moneys theretofore received by him from and for account of the defendant, the sum of \$4843.39.

Fifth. That between the said last mentioned date and the 2d day of June, 1864, inclusive, said Caleb Barstow paid out in divers sums, and at sundry times, for account of the defendant, and at its request, the sum of \$5383.83, and that during the same period and after that, and prior to the commencement of this action, he received from the defendant and from other sources, for account of the defendant, the aggregate sum of \$6360.93, and no more.

Sixth. That interest on the said several sums so paid out by the said Barstow, including said balance of \$4843.39, due him on October 12, 1862, as aforesaid computed to the date of the report, over and above all interest on the said sums received by him, amounts to the sum of \$2962.22.

Seventh. That the said Caleb Barstow on the 19th day of January, 1866, duly assigned his claim and demand, and his right of action therefor, against the defendant for the matters aforesaid, to the extent of \$2000 thereof, to the plaintiffs, Martin W. Brett, Gustavus A. Brett and James E. Brett, composing the firm of Brett, Son & Co., aforesaid.

Eighth. That on the 24th day of January, 1868, said Caleb Barstow duly assigned the residue of said claim and his right of action therefor to the plaintiff Lyman B. Carhart, as such trustee as aforesaid, and that on said date he was indebted to said estate for more than the amount of such assignment.

And the referee found, as a conclusion of law, that the plaintiffs were entitled to recover of the defendant the sum of \$6827.51, with costs of this action. And he ordered judgment accordingly.

Smith & Woodward, for the appellant.

W. P. Richardson, for the respondents.

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By the Court, LEONARD, J. The omission to plead the appointment of a receiver of Barstow, prior to the assignment by him to the plaintiffs, of the demand in suit, upholds the decision of the referee, excluding evidence of the proceedings supplementary to execution and the appointment of a receiver. The ownership of the demands in suit by the receiver should have been affirmatively stated. This evidence cannot be introduced to sustain a denial that the demand had been assigned to the plaintiffs and that they were the owners. Perhaps evidence tending to show that the assignment by Barstow was without consideration, or that he had made no valid transfer, was admissible under the denial; but not the ownership of the demand by a third party. (*Savage v. The Corn Exchange Ins. Co.*, 4 Bosw. 12; *opinion by Woodruff, J. Seeley v. Engell*, 17 Barb. 530.) This last case was reversed by the Court of Appeals, (13 N. Y. 542,) but on a different point, leaving the case as authority upon this subject, inasmuch as it is not referred to or mentioned as a ground for reversal. I am aware that there is some diversity of opinion, upon this question, but I am inclined to hold the rule now stated, as the better one, in pleading and practice.

It is objected that the referee refused leave to amend the answer so as to admit the evidence so excluded. Five years had elapsed since the receiver was appointed. The defendant had not, during that time, been called on to pay, and had not sought to discharge its obligation to the receiver, nor to the plaintiffs as the assignees of Barstow. The subject of amendment is given, by the Code, to the referee, with large discretion, and I cannot say that he did not exercise the discretion soundly. It is a technical defence, coming within the class usually called dilatory pleas, and we should not disturb the judgment on this ground.

It was proven, in the case, without objection, that at a meeting of the church, in January, 1865, when Mr. Bar-

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stow was present, the pastor, Mr. Blanchard, stated that he was authorized by Mr. Barstow to state to the society that there was a large deficiency in the revenues; that his accounts were not made up, and he could not state the exact amount, but that if \$2300 was raised, he, Barstow, would accept it in full settlement of his accounts against the church; and Mr. Blanchard then called upon the society for subscriptions for that amount. This sum was raised by the society, and paid to Mr. Barstow, within a short time.

This must be held to be a good accord and satisfaction, upon two grounds:

1st. The agreement was between Mr. Barstow and the members of the society, not otherwise personally liable, who paid that sum for the satisfaction of his demand against the society.

2d. The demand being uncertain as to amount, as Mr. Barstow conceded by admitting that he could not state the amount, at that time, the payment of \$2300 on behalf of the defendants, under an agreement that it should be received in satisfaction, operated as a full and final release of his demand.

This defence was not set up in the answer, and the referee refused to find the fact for that reason, as I understand it. The evidence was before him, however, and I think he was bound to decide the case accordingly. The pleadings must be deemed to have been amended so as to include this evidence.

There must be a reversal of the judgment, and a new trial before the same referee; with costs to abide the event.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 4, 1872.
Leonard and Gilbert, Justices.]

WILLIAM MARX vs. THE PEOPLE.

The same rules must govern the examination of a prisoner on trial, when he avails himself of his privilege to become a witness, as apply to any other witness.

One of these rules is, that a party cannot, upon cross-examination of a witness for the adverse party, draw out collateral statements, not material to the issue on trial, and then contradict such statements. He is concluded by the answer of the witness.

Upon the trial of a prisoner, upon an indictment, he became a witness in his own behalf. On his cross-examination by the district attorney, he testified that he had not been convicted of burglary, before the alleged offence was committed. This question was then put to him: "I ask you again, specifically, were you not, on April 25, 1856, arraigned at the bar of this court, charged with the crime of burglary; did you not confess your guilt, and were you not sentenced to three years in the State prison, for that offence?" The prisoner answered, "I was not. No, sir." The district attorney offered to prove, by the records of the court, that a person by the name of the prisoner was convicted of felony. The court, although it decided that this was immaterial proof, unless it was connected, in some way, with the prisoner, admitted the evidence. The district attorney then stated the contents of a record which showed a conviction of a person of the same name as the prisoner, on the 25th of April, 1856, of burglary in the third degree. Subsequently the court rejected evidence to show that the prisoner was the person named in the record of conviction.

Held, that the above rule of evidence was violated, on the trial. That the record of conviction was inadmissible, even in connection with the testimony *alimunde*, that the prisoner was the person named in it; and it should have been rejected altogether.

Held, also, that it was impossible to say that the prisoner was not prejudiced by this evidence, or that the rejection of the evidence offered, to show the identity of the person named in the record, cured the error. That the record being in, the jury, in the absence of testimony on the subject, had a right to draw the inference of identity of person from the identity of name. And that the judge should have withdrawn the matter from the consideration of the jury, and have told them, distinctly, to disregard it.

Competent evidence cannot be rejected on the ground that it is inconclusive, or of little weight.

ERROR to the New York court of general sessions, to reverse a conviction for a felony.

By the Court, GILBERT, J. Upon the trial, the prisoner became a witness on his own behalf. On his cross-examination by the district attorney, he testified that he had

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not been convicted of burglary, before the alleged offence was committed. At a later stage of his cross-examination, this question was put to him: "I ask you again, specifically, were you not, on April 25, 1856, arraigned at the bar of this court, charged with the crime of burglary? Did you not confess your guilt, and were you not sentenced to three years in the State prison, for that offence?" The prisoner answered: "I was not. No, sir." The case shows that afterwards the district attorney renewed his motion to prove by the records of the court that a person by the name of the defendant was convicted of felony; upon which the prisoner's counsel objected to the evidence. Thereupon the court decided: "This is immaterial proof, unless it is connected, in some way, with the prisoner. It is a preliminary offer upon an immaterial matter, and it will be time for you (the prisoner's counsel) to object when he (the district attorney) offers a witness to prove a substantive matter." To this decision the prisoner's counsel excepted. The district attorney then stated the contents of a record which showed a conviction of William Marx, April 25, 1856, of burglary in the third degree, a copy of which appears in the bill of exceptions. Subsequently, the court rejected evidence offered to show that the prisoner was the person named in the record of conviction.

It is now conceded that the record of conviction was inadmissible, even in connection with the testimony *aliunde*, that the prisoner was the person named in it. This is no doubt correct. The same rules of evidence must govern the examination of a prisoner, when he avails himself of his privilege to become a witness, as apply to any other witness. One of these is, that a party cannot, upon cross-examination of a witness for the adverse party, draw out collateral statements, not material to the issue on trial, and then contradict such statements. He is concluded by the answer of the witness.

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We think this rule was violated, in this case. Although the decision of the court was, that the evidence objected to was immaterial without further evidence connecting it with the prisoner, yet the evidence was admitted. It should have been rejected altogether. It is impossible to say that the prisoner was not prejudiced by it; or that the rejection of the evidence offered, to show the identity of the prisoner as the person named in the record, cured the error. The record was in, and in the absence of testimony on that subject the jury had the right to draw the inference of identity of person, from the identity of name.

The remarks of the judge, on this subject, in his charge to the jury, were too restricted to obviate the effect which must have been produced by the record. He should have withdrawn it from the consideration of the jury, and have told them, distinctly, to disregard it. Not having done so, the error remains.

We think, also, that the court erred in rejecting evidence of the nature of the disease which the prisoner had. Taken in connection with the prisoner's testimony, it was certainly competent. It may have been inconclusive, or of little weight, but competent evidence cannot be rejected on that ground.

For these reasons, the judgment below must be reversed, and a new trial must be granted to the prisoner.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November, 4, 1872. *Ingraham, Leonard and Gilbert, Justices.*]

In the matter of the petition of LUCINDA L. MORGAN and others, for the removal of William R. Morgan, as trustee.

Although the wishes of a *cestui que trust* should not, in all cases, control the removal or the appointment of a trustee, yet where the *cestui que trust* is of full age, in every way competent to judge for himself, and to form an opinion as to what person would be agreeable to him as a trustee, his wishes should have great weight with the court.

Where two of the trustees and the *cestui que trust* joined in a petition praying for the removal of the third trustee, and a referee made a report recommending the removal, the court, considering the intimate and confidential relations and transactions existing between trustees and the *cestui que trust*; that the person really in interest was the *cestui que trust*; that she was of mature age; and that difficulties had arisen among the three trustees, and the *cestui que trust* sympathised with the two who joined with her in the petition, removed the third trustee; although there was nothing in the report affecting his moral character, and it appeared that he had intended to discharge the duties of his office with strict fidelity.

THE petitioners, Lucinda L. Morgan and Henry Morgan, are trustees, and Lucinda M. Ely the *cestui que trust*. They applied to the court, by petition, for the removal of the co-trustee, William R. Morgan. The matter was referred to a referee, and a report was made, recommending the removal. On that report an order of removal was entered; from which William R. Morgan appealed.

By the Court, LEARNED, J. There is nothing in the report affecting the moral character of the appellant. On the contrary, the referee expressly states his belief that many of the acts complained of are to be traced to a conscientious conviction that they were in the line of his duty. And in the view we take of the matter we may assume that the appellant has intended to discharge the duties of his office with strict fidelity.

We cannot say that, in all cases, the wishes of a *cestui que trust* shall control the removal or the appointment of a trustee, but in a case like the present, where the *cestui*

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que trust is of full age, in every way competent to judge for herself, and to form an opinion as to what person would be agreeable to her as a trustee, we think that her wishes should have great weight with the court. It is plain that difficulties have arisen among the three trustees, and the *cestui que trust* sympathises with the two who join in the petition. Now the relations between trustees and the *cestui que trust* must necessarily be intimate. The parties must frequently be brought together in business transactions of a confidential character. It is therefore very important that there should be full and perfect harmony between them. And as the person really in interest is the *cestui que trust*, we think that when she is fully capable of deciding for herself, she should be allowed to do so. The trustees have no personal interest in the matter. They are only charged with a duty, and one which is generally onerous, and poorly compensated.

With these views, and without expressing any opinion unfavorable to the character or to the integrity of the appellant, we think the order should be affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 4, 1872.
Leonard and Learned, Justices.]

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KLINCK vs. KELLY, Sheriff, &c.

After a stock of goods, in a store, belonging to F. & T. had been levied upon by the sheriff by virtue of an attachment at the suit of P. & Co., an agreement was made by F. & T. for the sale of the goods to the plaintiff. An inventory was made, and thus the goods were designated; the price was agreed upon, a part of it paid, and notes given for the balance, after deducting the amount of the debt due in the attachment suit of P. & Co., of which debt the plaintiff assumed the payment; and a bill of sale of the goods was made by F. & T. to the plaintiff, and receipted; and all that it was in the power of the vendors to do was done, to make a delivery of the goods. *Held* that, assuming that the transaction was not fraudulent, it embraced

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all the elements requisite to make an effectual sale of the goods to the plaintiff.

Held, also, that the sheriff was not authorized to seize or hold the goods under attachments issued against the property of F. & T. after such sale to the plaintiff was made; for the reason that the goods were no longer the property of F. & T., but of the plaintiff.

And the plaintiff having offered, before commencing this action against the sheriff, to pay him the amount for which he held the goods at the time of the sale thereof to the plaintiff, if he would restore the goods, which the sheriff refused to do, claiming the right to hold them under the subsequent attachments; *Held* that after such refusal, a formal tender would have been useless, and was therefore unnecessary.

Held, further, that the plaintiff's right to the possession of the goods, upon payment of the amount of the first attachment, and costs, was clear. That the offer to pay, under the circumstances, was equivalent to actual payment; and the refusal of the sheriff to restore the goods on receiving the offer of payment, was an act of conversion, on his part.

A PPEAL from a judgment entered upon a dismissal of the complaint on the trial at the circuit, before the court and a jury.

The complaint was for the wrongful taking and unlawful detention and conversion of the interest of the plaintiff in goods, wares and merchandise, of the value of \$45,000, owned by the plaintiff, subject to the lien of an attachment for about \$11,000, issued to and levied by the defendant as sheriff of the city and county of New York.

The answer denied the alleged ownership of the property, also the alleged wrongful taking, detention, and conversion, and set up a justification of the taking, &c., under various attachments.

It was proved at the trial, that on the morning of the 12th of November, 1866, Folger & Tibbs, of the city of New York, were the owners of a stock of goods then in the store 54 Leonard street, in said city, on which goods an attachment, at the suit of Paine, Berry & Co., against them for about \$11,000, had, on the 10th of that month, been levied by the defendant as sheriff, by virtue of which the sheriff, by his assistants, had the goods in his custody at said store. The plaintiff was a merchant in dry goods

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and clothing, residing at Lyons, New York. He also had an auction business, which he carried on at different places in that vicinity. The plaintiff first became acquainted with Folger & Tibbs, October 9, 1866, at which time he bought goods of them. He came to New York on the morning of the 11th of November, and in the course of that day a negotiation was opened between Folger & Tibbs and the plaintiff for the sale of the goods to the plaintiff. In the evening and night of that day an inventory of the stock of goods was taken by Folger & Tibbs. When it was completed, and between twelve and one o'clock the next morning, the negotiation resulted in the purchase of the goods by the plaintiff. The inventory amounted to about \$45,000, and the goods were of that value. By the terms of the purchase the plaintiff was to pay sixty cents on the dollar of the amount of the inventory as follows: to assume the payment of the attachment debt to Paine, Berry & Co.; to pay \$6000 in cash, and give his notes at thirty, sixty and ninety days at bank, for the balance; all which was done by the plaintiff. A bill of sale was thereupon given by Folger & Tibbs to the plaintiff for the goods, duly receipted. The plaintiff also paid Folger & Tibbs the rent of the store up to the 1st of December, they having hired it, and paid the rent to that time. During the negotiation for the purchase, the plaintiff consulted, and was advised by counsel, he could purchase the goods subject to the lien of the Paine, Berry & Co. attachment. After the payments had been made and the bill of sale delivered, the plaintiff was introduced to the sheriff, who had been there during the whole time, and told him he had bought the stock; that it was very near morning, and he thought he would not go to the hotel; to which the sheriff answered, "very well, there is a couch; there are some blankets, you can make yourself comfortable." Tibbs gave to the plaintiff the keys of the store; then all went away except the two watch-

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men, the porter, and the plaintiff; the plaintiff remained in possession about ten days. The next morning, the 12th, the plaintiff was at work, arranging the goods. About ten o'clock, between ten and eleven, the sheriff came in with attachments; afterwards, that day, he came in, several times, with other attachments. On the 13th, 14th and 17th of November, other attachments subsequent to that in favor of Paine, Berry & Co., were issued to the sheriff, under which attachments the defendant claimed to hold the entire interest in the goods, subject to the lien of the first named attachment. After the purchase, and while the plaintiff and the sheriff were in the store together, the plaintiff told the sheriff he was willing to pay the first attachment if he could have the goods. The sheriff said, "they were determined to hold them." This action was commenced December 27, 1866. In the latter part of December, before the commencement of the action, the plaintiff, by his attorney, called on and informed the defendant that he should hold him responsible for the goods, less the amount of the first attachment; and offered to pay him the amount of that attachment. The defendant waived a formal tender; and refused to give up the goods, claiming them under the other attachments. The goods were sold by the sheriff before the commencement of this action, some time in November, except some that had been replevied from the sheriff; and the amount realized at the sale, beyond satisfying the first attachment and expenses, and which went to the second attachment, was \$5713.62. After the sale, and before the commencement of this action, the plaintiff, by his attorney, notified the sheriff that he was required to defend the replevin suits, and demanded of the sheriff the surplus money. Evidence was received, on the part of the defendant, of the attachments subsequent to the purchase of the goods by the plaintiff, under objections and exceptions on the part of the plaintiff.

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At the close of the evidence, the defendant moved for a dismissal of the complaint, on the grounds stated in the case, 1. That the plaintiff had failed, by his proofs, to establish a cause of action. 2. That no title to the goods had passed to the plaintiff. 3. That this action could not be maintained, whether considered as an action of trespass or trover. 4. That the attachment in favor of Paine, Berry & Co. had not been paid before the levy under the second attachment. The motion was granted, and the plaintiff excepted to the decision.

T. R. Strong, for the appellant.

I. It must be assumed, in the review of the decision dismissing the complaint, that the transactions between the plaintiff and Folger & Tibbs, of the purchase of the goods by the plaintiff, and relating thereto, were free from any intention to defraud creditors, and in good faith. 1. Under the evidence, the question of fraud did not belong to the court; but was exclusively for the jury. 2. The motion was not made upon the ground of fraud. 3. And the dismissal could not be justified on such ground. The decision would be erroneous for withdrawing the case from the jury. No request that the case be submitted to the jury, was necessary. The decision was a refusal to do so. (*Sheldon v. The Atlantic Fire and Marine Ins. Co.*, 26 N. Y. 460, 464, 465.)

II. Both parties assumed that Folger & Tibbs were the owners of the goods, and claim under them. The defendant claiming by virtue of the attachment of Paine, Berry & Co., two days prior to the purchase by the plaintiff, the 12th of November, 1866, and other attachments subsequent to that purchase. The plaintiff claiming by his purchase, subject to the attachment of Paine, Berry & Co., and prior to the other attachments.

III. The purchase by the plaintiff vested in him the entire interest of Folger & Tibbs in the goods, which was

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the sole and absolute ownership, subject to the lien of the attachment then upon the goods. The delivery of the goods, subject as aforesaid, was full and ample, but a delivery of the bill of sale would have been sufficient to vest the title without any other delivery. (*Wilkes v. Ferris*, 5 John. 335. *Russell v. Carrington*, 42 N. Y. 118, 124, 125. *Terry v. Wheeler*, 25 id. 520, 524-526. *Olyphant v. Baker*, 5 Denio, 379.) The sheriff, by that attachment, had only a qualified, special interest, a mere lien for the purpose of the collection of the attachment debt; the ownership and whole interest beyond that was in the plaintiff. (*Pierce v. Kingsmill*, 25 Barb. 631. *Rhoads v. Woods*, 41 id. 471, 474. *Frost v. Mott*, 34 N. Y. 253, 255. Code, § 227, &c., as to lien of attachment.) The sheriff might retain the goods, or sell them under the order of the court, and hold the proceeds to the amount of the debt, but beyond that had no right to them whatever. If Folger & Tibbs had, after the levy of the attachment, assigned the goods to pay creditors, the assignee would have acquired the title subject to the payment of the debt to the attaching creditor. (*Grant v. Chapman*, 38 N. Y. 293.) And upon the same principle the absolute purchaser would acquire the absolute ownership, subject to the like payment. (*Frost v. Hill*, 3 Wend. 386.)

IV. It was an unlawful taking and conversion of the interest of the plaintiff in the goods to assume to attach, hold and dispose of it, under attachments against Folger & Tibbs coming to his hands subsequent to the purchase by the plaintiff. The levy of the subsequent attachments was wrongful, as against the plaintiff's interest. It was an assertion of dominion over the property beyond the lien of the first attachment, which was a conversion. The defendant asserted a right to the whole property to satisfy all the attachments. It was, most clearly, an unlawful taking and conversion to insist upon retaining and selling the property after the offer of the plaintiff to pay the

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attachment, connected with the waiver by the defendant of a formal tender. (*Meserole v. Archer*, 3 Bosw. 376, 382.)

V. The sale of the goods to the amount of \$5713.52 beyond what was necessary to pay the first attachment, and applying that surplus to the subsequent attachments was, manifestly, an unlawful taking and conversion.

VI. The admission in evidence of the subsequent attachments, and the proceedings connected with them, was erroneous.

A. J. Vanderpoel, for the respondent.

I. The court properly dismissed the complaint, because no title to the goods in controversy had ever passed to the plaintiff. 1. At the time of the alleged sale Folger & Tibbs had neither the possession of the property nor the right to such possession. 2. The payment of the Paine attachment by the plaintiff was a condition precedent which was not performed, and was not and could not be waived. It was part of the cash consideration; delivery of the property could not be made, and the transfer was not intended by the parties to be complete until after payment of said attachment indebtedness by the plaintiff. (*Smith v. Lynes*, 5 N. Y. 44.)

II. The sheriff was justified in selling the property as he did, and no tender of the amount, or payment, of the Paine attachment, after the delivery of the subsequent attachments to him, could relieve him of the duty of selling. The property in the defendant's hands was subject to the attachments received by him on Monday, and, by operation of law, these attachments became liens upon the property from the time of their delivery to him.

III. The complaint is for wrongfully taking and unlawfully detaining and converting the property of the plaintiff. The action was not sustained by the evidence, because it failed to show property in the plaintiff of the goods in question, and a right of possession thereto, at

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the time of the alleged taking and conversion. The right of possession, with either general or special property in the plaintiff, was essential to sustain the action.

By the Court, GILBERT, J. The questions presented are: 1st. Whether there was a valid and completed sale of the goods by Folger & Tibbs to the plaintiff; and 2d. Whether the facts make out the cause of action alleged. Upon both these questions our opinion must be in the affirmative.

Nothing appears to be wanting to make an effectual bargain and sale of the whole stock of goods. An inventory was made, and thus the goods were designated; the price was agreed upon, and a part of it paid; and all that it was in the power of the vendors to do was done, to make a delivery of the goods. The goods had been seized by the sheriff by virtue of an attachment against Folger & Tibbs. But this did not alter the general property in the goods, or disable Folger & Tibbs from making a sale of them, subject to the rights acquired by means of the attachment. The attachment created a lien only. The goods were held by the sheriff contingently "as security for such judgment as the attaching creditor might recover;" (*Code*, § 227;) and upon payment of the debt and all costs of the proceeding, it was the duty of the sheriff to restore the property. (*Idem*. § 237.) We have no doubt that the transaction embraced all the elements requisite to make an effectual sale of the goods. (*Crofoot v. Bennett*, 2 N. Y. 258. *Olyphant v. Baker*, 5 Denio, 379.) The sheriff was not authorized to seize or hold the goods under the attachments which came into his hands after this sale was made; for the reason that the goods were no longer the property of Folger & Tibbs, but of the plaintiff. It is scarcely necessary to observe that the court below having nonsuited the plaintiff, we are bound to assume, in the present disposition of the case, and have assumed, that the transaction between the plaintiff and Folger & Tibbs

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was not fraudulent, as to the creditors of the latter. For if the question of fraud had been raised, in the court below, it would have been the duty of the court to submit the case to the jury.

The plaintiff offered, before this action was commenced, to pay the sheriff the amount for which he held the goods, at the time of the sale to the plaintiff, if he would restore the goods. This was refused by the sheriff, on the ground which was distinctly stated by him—that he should hold the goods under the other attachments. After such a refusal, a formal tender would have been useless, and was therefore unnecessary.

The plaintiff's right to the possession of the goods, upon payment of the amount of the first attachment and costs, is clear. The offer to pay, under the circumstances, was equivalent to actual payment, and the refusal of the sheriff to restore the goods on receiving the payment offered, was an act of conversion on his part.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 4, 1872.
Leonard and Gilbert, Justices.]

HENRY NEWMAN, plaintiff in error, *vs.* THE PEOPLE of the
State of New York, defendants in error.

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Under the act of the legislature of May 7, 1869, which provides that a party accused of crime shall, at his own request and not otherwise, be deemed a competent witness in his own behalf, a prisoner, on his trial, was put upon the stand as a witness in his own behalf, and examined by his own counsel, and cross-examined by the district attorney. On his cross-examination, being asked if he had been in the State prison, he said he had, and served out his term. The court instructed the jury to wholly disregard the testimony of the prisoner. *Held* that this was an error.

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Held, also, that it was an error in the court, if the testimony could have been excluded, to admit the testimony and then direct the jury to disregard it.

The law intended to allow a prisoner the benefit and privilege of stating to the jury any matter calculated to explain the charge against him. This privilege is to be enjoyed irrespective of any matter which could disqualify a witness under ordinary circumstances.

The degree of credit to which a prisoner, examined as a witness in his own behalf, is entitled, is to be decided by the jury, and not the court.

ERROR to the New York court of general sessions, where the prisoner was tried upon an indictment for grand larceny.

The indictment charged this larceny as a second offence. It alleged that the said Newman, by the name of Edward Ryan, was duly convicted of grand larceny in the court of general sessions, on the 23d day of May, 1860, and sentenced to imprisonment in the State prison for the term of two years, and then proceeded to charge him with the larceny for which he was then tried. On the trial, the prisoner was examined as a witness in his own behalf.

He was convicted and sentenced to the State prison for the term of ten years.

Wm. F. Howe, for the plaintiff in error.

I. The court erred in striking out the evidence of the prisoner, and in instructing the jury to disregard the evidence of the prisoner. In the case of *Delamater, plaintiff in error v. The People, defendants in error*, (Third department, September term, 1871; *Alb. Law Jour.*, February 24, 1872,) the prisoner was indicted for an assault with intent to commit rape, and, on the trial, he offered himself as a witness in his own behalf. The court refused to allow him to be sworn, because, as was admitted, he had served out a term in the State prison, having been sent there on a conviction for a felony. It was held, that, by chapter 678 of the laws of 1869, in all cases of trials by indictments, &c., against persons charged with any criminal offence, the person so charged, no matter how infamous, or

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to what extent branded by a judgment of conviction, should be permitted to testify in his own behalf. The court below erred in the rejection of the evidence offered, and the judgment and conviction was, for that reason, reversed. (*See S. C.*, 5 *Lans.* 332.)

II. The court erred in proving the former conviction of the plaintiff in error, before the prisoner had put his character in issue. (2 *Russell on Crimes*, 129. *The Queen v. Shuttleworth*, 3 *Carr. & K.* 375. 2 *Den. C. C.* 351. 5 *Cox's Crim. Cas.* 369, 387. *Roscoe's Crim. Ev.* 200. Also see *People v. White*, 14 *Wend.* 111.) We insist, that upon the authority of the case of *Delamater v. The People*, (5 *Lans.* 332,) and the other cases cited, the conviction should be reversed, and a new trial ordered.

Orlando L. Stewart, (assistant district attorney,) for the defendants in error.

I. The indictment was in the proper form, and the evidence to sustain it was competent testimony. It set forth the former conviction of the prisoner of grand larceny, his sentence, and avers that, "having been duly discharged and remitted of such judgment and conviction, afterwards, to wit," he committed the larceny charged in this indictment. (*Stevens v. The People*, 1 *Hill*, 261. 2 *R. S.* 722, *Edm. ed.*)

II. The prisoner, on the trial, offered himself as a witness in his own behalf, and it appearing, by his own testimony, that he had been in State prison; had not been pardoned, but served out his term of imprisonment, the district attorney moved the court to instruct the jury to wholly disregard the testimony given by the prisoner in his own behalf; and the motion was granted. The prisoner having been convicted of a felony, and served a term in the State prison, was incompetent to testify. His character as a witness was, by his own infamy, destroyed. (2 *R. S.* 724, *Edm. ed.*) The act of the legislature of 1869

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provides that a party accused or charged with commission of a crime, shall "be deemed a competent witness," "at his own request, but not otherwise." (*Laws of 1869, ch. 678.*) When a party accused of crime offers himself as a witness in his own behalf; when he exchanges his position in the dock for the witness stand, he ceases, for the time being, to be a party, and becomes a witness, and is subject to all the rules and tests governing other witnesses. (*Brandon v. The People, 42 N. Y. 265. The People v. Conners, Court of Appeals, not yet reported.*)

By the Court, INGRAHAM, P. J. On the trial of this case in the court of general sessions, the prisoner was put on the stand and examined as a witness in his own behalf, under the provisions of the act of May 7, 1869, (*Laws of 1869, ch. 678,*) which provides that a party accused of crime shall, at his own request, and not otherwise, be deemed a competent witness in his own behalf. He was examined at length by the counsel for the prisoner, and by the district attorney. On the cross-examination he was asked if he had been in the State prison. He said he had, and served out his term. On this proof, the district attorney asked the court to charge the jury "to disregard his testimony, on the ground that having served as a felon, being civilly dead, in law, he was not competent as a witness." The court instructed the jury to wholly disregard the testimony of the prisoner.

We think this was an error. The law intended to allow a prisoner the benefit and privilege of stating to the jury any matter which was calculated to explain the charge against him. This privilege was to be enjoyed irrespective of any matter which could disqualify a witness under ordinary circumstances. The degree of credit to which he was entitled was to be decided by the jury, and not the court. And yet the court refused him the

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privilege given to him by the law, because he was not worthy of belief.

This question has been examined and decided in the third district, in *Delamater v. The People*, (5 *Lans.* 332.) The court, in that case, say: "The person charged with any criminal offence, no matter how infamous, should be permitted to testify in his own behalf."

It was also an error in the court, if the testimony could have been excluded, to admit the testimony and then direct the jury to disregard it. However guilty the prisoner may be, he is entitled to all that the law gives him, on his trial; and when the provisions and rules of law are violated, it is the duty of the court to direct a new trial.

Judgment reversed, and new trial ordered.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 4, 1872.
Ingraham, Leonard and Gilbert, Justices.]

JACOB ROSENWEIG, plaintiff in error, *vs.* THE PEOPLE,
defendants in error.

When a prisoner, on his trial, is examined as a witness in his own behalf, under the act of the legislature, of 1869, it is not competent to impeach him as a witness, nor any other witness, by contradicting him as to facts disconnected with, or collateral to, the subject matter at issue and on trial.

The plaintiff in error, on his trial for procuring an abortion upon B., after being examined as a witness in his own behalf, testified, on his cross-examination, that he did not know W., a young woman in court then pointed out to him; that he had never seen her; and that he had never procured an abortion upon her. W. was then sworn, and testified, (against an objection and exception,) that the prisoner had produced an abortion upon her person, about two years before. *Held* that upon well established authority the admission of this testimony of W. was an error.

Held, also, that the illegal evidence so admitted tended to damage the prisoner's case by inducing a conviction in the mind of the jury, from the commission of the previous offence, that he had committed the crime for which he was then on trial.

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No person can be required to come into court, on a trial upon an indictment for a specific offence, prepared to defend or explain other transactions, not connected with the one on trial.

The admission of illegal evidence cannot be disregarded, or excused upon the ground that the other evidence in the case was sufficient to justify a conviction. The conviction must be had by legal evidence, only.

ERROR to the New York court of general sessions, to reverse a conviction for manslaughter.

The plaintiff in error was indicted under the statute, passed May 6, 1869, for manslaughter in the second degree, in causing the death of Alice Augusta Bowlsby, which death was charged to have been produced by the use and employment, by the plaintiff in error, of certain instruments upon the body of said Alice, with intent to produce a miscarriage. On the 25th of October, 1871, the indictment was brought to trial, at the court of general sessions of the peace of the city and county of New York, before the Hon. John K. Hackett, recorder, and after a trial, lasting four days, the plaintiff in error was convicted of manslaughter in the second degree, and sentenced to the State prison for the term of seven years.

The facts necessary to an understanding of the questions decided, appear in the opinion of the court.

W. F. Howe and *Ira Shafer*, for the plaintiff in error.

The defendant was inquired of, by the district attorney, on cross-examination, whether he had ever procured an abortion upon Nellie Willis, a woman produced in court, and he denied having done so. Then, under the defendant's counsel's objection, Nellie Willis was placed upon the stand, and she was permitted to testify that two years before the trial he performed an abortion upon her. This evidence was improperly received. 1. The denials of the defendant were conclusive upon the prosecution. 2. The people could not contradict the defendant's denials, as they related to collateral matters. 3. The evidence tended

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to the multiplication of issues. 4. The evidence was highly prejudicial to the accused, and no doubt insured his conviction on the main charge. The following authorities show that the court erred in admitting the evidence: 1 *Phil. Ev.* 960, 969 to 973, *Edw. Notes*; 1 *Greenl. Ev.* §§ 51, 52, 448-450; *Commonwealth v. Buzzell*, (16 *Pick.* 153, 157;) *Patchin v. The Astor Mutual Ins. Co.*, (3 *Kern* 268;) *Carpenter v. Ward*, (30 *N. Y.* 243;) *Newcomb v. Griswold*, (24 *id.* 299;) *Lawrence v. Barker*, 5 *Wend.* 301;) *Harris v. Wilson*, (7 *id.* 57;) *Howard v. City Fire Ins. Co.*, (4 *Denio*, 502;) *Stephens v. The People*, (19 *N. Y.* 572;) *Ross v. Ackerman*, (46 *id.* 210.) 5. "Where the error is in the admission of illegal evidence which bears in the least degree on the question in issue, it cannot be disregarded." (*Worrall v. Parmelee*, 1 *Const.* 519, 521.)

S. B. Garvin, (district attorney,) for the people.

I. The objection to the question put to the prisoner as a witness, as to his having produced an abortion upon Nellie Willis, was properly overruled. The question was put on the cross-examination of a witness for the defence. The extent of such cross-examination is always subject only to the discretion of the court, and the exercise of that discretion is not subject to review. (*Labeau v. The People*, 6 *Park.* 374, 395. *Real v. The People*, 42 *N. Y.* 270. *Newcomb v. Griswold*, 24 *id.* 298. *The People v. Blakeley*, 4 *Park.* 176. *Great W. Turnpike Co. v. Loomis*, 32 *N. Y.* 127.)

II. The court properly overruled the objection made to the evidence of the witnesses Woodward and Nellie Willis, as to the commission of previous abortions by the prisoner. 1. The character of the defendant had been made an issue in the case, and any evidence effecting that question was material, and not collateral or irrelevant. The defence called and examined thirteen witnesses, who testified to the defendant's character. Many of these witnesses were persons who had been patients of the defendant, and

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the counsel brought out from them that he (defendant) was a "good doctor," and a man of good character. The defence attempted to establish, by these witnesses, not only that the defendant was a man of good character, but that he was a regular, reputable physician, one who associated in consultations, &c., with the most respectable medical talent in the land, and that the defendant, of all men, was the least likely to be guilty of a felonious abortion. This was one of the main elements of the defence. The defence thus sought to prove, for the prisoner, a particular credit, as distinguished from general reputation or character. 2. It must be remembered that one of these witnesses for the defence to the defendant's character was the prisoner himself. He himself, in his testimony on his direct examination, testified to facts tending to show himself to be a graduate of a respectable medical institution; a man of learning, probity and respectability. Having thus made the defendant's character a direct issue in the case, the defence now seek to prevent evidence being given by the prosecution to rebut the testimony given by themselves, on the ground that it is collateral. Woodward was called to contradict the witness, Rosenweig, as to material matters brought out on his cross-examination. They were material, because they related to a subject made so by the defence itself. And being material, the district attorney was not concluded by the witness' answer, and was at liberty to contradict him. (2 *Phil. on Ev.* 900, 901.) 3. They cannot object to testimony as irrelevant or collateral which is offered to rebut evidence on the same subject, introduced by themselves. (*See Stephens v. The People*, 19 *N. Y.* 573.) "To determine whether a question is relevant on a cross-examination frequently involves a nice and difficult inquiry into the nature of the issue or point in question, and the manner in which the question may be brought to bear upon it. We are to ask, would the answer, in any possible shape, or in the

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slightest degree, affect any question of fact which can be raised in the cause; if it may, the inquiry is relevant." (2 *Phillips on Ev.*, Cowen & Hill, 902, note 581. See, also, *Starks v. The People*, 5 *Denio*, 106; *Newton v. Harris*, 6 *N. Y.* 345.) The question thus presented by the defence to the jury was this: "Is this defendant a person likely to have committed this crime? Would he be likely to do it? Is it probable that a good doctor, a reputable physician, a graduate of Warsaw University, a man who has been in frequent consultation with Dr. Willard Parker and other eminent and respectable physicians; this man who has borne an unblemished character for six years in this community, would be guilty of this crime? If it is not probable, why, here, in a case where the evidence against him is circumstantial, you should acquit." And this court is called upon to say, that in a case where this issue is raised by the defence—where on cross-examination of the witness-prisoner, this defence is sought to be disproved and rebutted, by showing out of his own mouth that he had been for years the associate in business with divers professed abortionists, the people are concluded by his denial, and are not to be allowed to show the true state of the case, by contradicting him. It is only where new matter is brought out on cross-examination, and where that matter is collateral and irrelevant, that the cross-examining party is concluded. It was also competent to contradict the testimony given by the prisoner-witness, as to these material matters, with a view to attack and impeach his credibility as a witness. A prisoner, when he becomes a witness in the case, wholly divests himself of his character and position as a prisoner, and as far as his testimony is concerned is a witness merely. He can claim no privileges because he is the defendant on trial. (See *Connors v. The People*, MS., *Court of Appeals*. *Brandon v. The People*, 42 *N. Y.* 265.) If the evidence admitted, under objection, was otherwise competent, it cannot be excluded on the

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ground that it tends to show, or does show, that the defendant has been guilty of other and distinct felonies. *Roscoe*, (*Crim. Ev.* p. 86,) says: "The notion that it is in itself an objection to the admission of evidence that it discloses other offences, especially where they are the subject of indictment, is now exploded. If the evidence is admissible on general grounds, it cannot be resisted on this ground." Citing *R. v. Salisbury*, (5 C. & P. 155;) *R. v. Clewes*, (4 id. 221;) *R. v. Richardson*, (2 F. & F. 343,) and numerous other cases. For authority on this point, in this country, see *Osborne v. The People*, (2 Park, 583;) *The People v. Wood*, (3 id. 681;) *Stout v. The People*, (4 id. 132;) *State v. Watkins*, (9 Conn. 47;) *Com. v. Heavice*, (2 Yeates, 144.)

By the Court, LEONARD, J. The defendant, Rosenweig, was indicted and tried at the general sessions of the peace of the city of New York, for producing an abortion upon Alice Augusta Bowsby, resulting in a conviction for manslaughter in the second degree, and his sentence to the State prison for seven years. A case of probable guilt was proven against the defendant, at the close of the testimony for the prosecution, when he was sworn and testified as a witness in his own behalf, and gave his explanation of the facts proven against him, as he was authorized to do by an act of the legislature passed in 1869. (*Laws of 1869, ch. 678.*) On his cross-examination by the district attorney, he testified that he did not know Nellie Willis, a young woman in court then pointed out to him; that he had never seen her in his life; and that he had never procured an abortion upon her. Nellie Willis was afterwards sworn, and testified, against an objection and exception by the prisoner's counsel, that the prisoner had produced an abortion upon her person, about two years before, by the use of instruments, at a time when she was three and a half months advanced in pregnancy.

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The admission of this testimony was an error, upon well established authority. It was not competent to impeach the prisoner as a witness, nor any other witness, by contradicting him as to facts disconnected with, or collateral to, the subject matter at issue and on trial. The prisoner was not indicted for producing an abortion upon Nellie Willis, nor was he notified or prepared to meet that charge. No person can be required to come into court, on a trial under an indictment for a specific offence, prepared to defend or explain other transactions, not connected with the one on trial. There is no reason for doubting, in this particular case, that Nellie Willis testified truly; but her testimony might have been false, and having been brought out unexpectedly, the prisoner could not have been prepared for it; nor could he be expected, on the instant, to vindicate himself. He would be wholly unable to meet it, were the charge of Nellie Willis unquestionably fictitious. Evidence of general good character would not relieve the prisoner from the stigma of the crime proved by Nellie Willis, nor restore the presumption in his favor which might otherwise have been created by his own evidence. Every person is presumed to be able to defend himself against evidence of general bad character for truth, but not so as to proof of particular acts of crime or misdemeanor.

The illegal evidence so admitted tended to damage the prisoner's case, by inducing a conviction, in the mind of the jury, from the commission of the previous offence, that he had committed the crime for which he was then on trial. No one can for a moment suppose that a person charged with the crime of murder should be convicted on proof that he had committed a murder, two years before, on another person. The same principle applies to this case.

The admission of illegal evidence cannot be disregarded or excused upon the ground that the other evidence in the

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case was sufficient to justify a conviction. The conviction must be had by legal evidence, only. There would be no safeguard for innocence, if this rule were to be disregarded. It is in the highest degree important that justice should be sure and speedy, and that when a conviction has been had for an offence fully proven, the offender should not be able to escape on technical grounds, or for reasons not involving the merits of the subject of the indictment. But it is far more important to the course of public justice, that a fair trial should be secured, and that no person should suffer by an illegal conviction. A disregard of the legal rules established for the attainment of truth, on the trial of an action in a court, is but a mockery of justice, and rapidly degenerates to the standard of Lynch law.

The judgment must be reversed, and a new trial ordered, at the general sessions.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 4, 1872, *Ingraham, Leonard and Gilbert*, Justices.]

In Memoriam.

HON. THOMAS A. JOHNSON, LL.D.,

A JUSTICE OF THE SUPREME COURT, FOR THE SEVENTH JUDICIAL DISTRICT FROM THE ORGANIZATION OF THE COURT UNDER THE PRESENT CONSTITUTION, IN JULY, 1847; THE ONLY REMAINING JUDGE OF THE FIRST BENCH ELECTED IN JUNE, 1847; AND SINCE MAY 25, 1870, AN ASSOCIATE JUSTICE OF THE COURT FOR THE FOURTH JUDICIAL DEPARTMENT, DESIGNATED TO HOLD GENERAL TERMS; DIED AT HIS RESIDENCE IN CORNING, ON THE 5TH DAY OF DECEMBER, 1872, IN THE 69TH YEAR OF HIS AGE.

SOON after Judge JOHNSON'S decease, the following brief biography appeared, in a Rochester paper :

"The deceased was born in Blanford, Massachusetts, May 15th, 1804. His parents removed to Colesville, Broome county, New York, in 1816, where they resided until 1830. They were in limited circumstances, and as soon as he had acquired such an education as fitted him to become an instructor of others, he assumed the occupation of teacher, and taught school at Colesville and Greene, Chenango county. The spare hours afforded by this occupation were employed in gaining a knowledge of literature and scientific subjects, and the information thus obtained laid the foundation for the fund of useful knowledge of which his after life gave so many evidences. The embarrassments of this period of the young student's life were numerous, and, no doubt, were such as others who have earned a name in their country's history, and who have won high honors, have had to encounter.

Earnestness of purpose, untiring zeal, combined with an intellect of the first order, wrought such results in the mind of the late Judge as to render him a man of the highest culture and refinement, and fit him for the most honored position in the land.

While at Greene he entered the law office of the late Judge Monell, who was at that time one of the ablest legal minds of the State, and at the very apex of his power, and under the guidance and tutorship of this learned man, the subject of this sketch became, by application and assiduity, a most proficient student, and commenced the practice of the law with a mind well stored with all that was necessary to the satisfactory performance of the duties of the profession. The practice at that time was not what it is to-day. It demanded the utmost diligence; it taxed every energy and required close study to master it. None but a man whose talents were varied, whose mind was of a superior mould was successful in acquiring even its rudimentary knowledge. Where one aspirant to the profession followed it to a successful close a score fell by the wayside, and entered less arduous and perplexing pursuits.

Judge Johnson was married to Miss Polly H. Birdsall, at Greene, Chenango county, on the 7th of June, 1830, and immediately removed to Centreville, a small village near Painted Post, Steuben county. He had just been admitted to the Bar, and at once entered upon the practice of the law at that place, continuing until 1837, when he removed to Knoxville, an adjoining village, now in the town of Corning. At Knoxville he remained two years and then removed to the present village of Corning. The home occupied by Judge Johnson at the time of his death, and the residence of Mr. Sumner, standing near it, were the first dwellings built in the place, and they are regarded as the nucleus of what is now the prosperous and flourishing village of Corning. While at Centreville Judge Johnson formed a partnership with a gentleman by the name of Cotton, and after his removal to Corning he became the senior member of the law firm of Johnson & Covill. This firm enjoyed a large and lucrative practice for several years, commanding the respect and esteem of the courts and the profession, and winning the confidence of the

community. The business connection between these two eminent lawyers continued until 1847, when Judge Johnson was elected Justice of the Supreme Court. In the politics of that day Judge Johnson was an ardent whig, and for many years his efforts kept alive the spirit of that party in this section. By the new Constitution of 1846 it became necessary to reform the judicial districts, and through the influence of —, who was then a member of the legislature from the town of Reading, (then in Steuben and now in Schuyler county,) and the Hon. —, the county of Steuben was then transferred to the Seventh Judicial District, although geographically it should have been included in the Sixth. The sole object of this was that Judge Johnson might be made one of the justices of the Supreme Court by legislating his county into a whig district; the counties now composing the Sixth District were at that time overwhelmingly democratic. The result of this was that Judge Johnson was at the election of that year placed upon the bench, and began the long and brilliant career which has reflected so much honor upon his name, and which has placed him in the first rank of American jurists. Strange as it may seem, the deceased had no knowledge of the scheme which thus elevated him to his eminent position until ten years subsequent, when he was informed of it by —, who was cognizant of all the facts. In this day of rapid and easy communication by rail, and with our present facilities for travel, the inconvenience of this arrangement can scarcely be realized, but to this political scheme the State is indebted for all the advantages it has gained from the valuable services of the lamented Judge.

We have already stated that the deceased was married to Miss Birdsall in 1830. This happy union continued until March, 1865, when it was dissolved by her death. In December, 1866, Judge Johnson married Mrs. Sarah W. Parker, daughter of the late Hon. Henry Welles, of Penn Yan, who still survives him. Four daughters were born of the first union, who are still living, viz., Mrs. John Maynard, Mrs. Charles H. Thomson, Mrs. Hiram W. Bostwick and Miss Elizabeth Johnson. One daughter alone, five years of age, the issue of the second marriage, remains with those above named to mourn the loss of a loving parent and

a kind protector. Judge JOHNSON was, at the time of his death, a trustee of Elmira Female college."

The following resolutions were adopted by the trustees of the above named institution at a meeting held December 7 :

Resolved, That the trustees of the Elmira Female College have learned with the deepest sorrow of the death of Hon. THOMAS A. JOHNSON, LL.D., who from the first organization of the college to the time of his decease continued a member of the board of trustees.

Resolved, That we remember and recognize with grateful pleasure the deep and active interest which he always manifested in the welfare of the college, his habitual and prompt attention upon the meetings of the board, his general courtesy in his intercourse with his associate trustees, his readiness to give professional counsel and valuable advice for the benefit of the college, and his appreciative gratification with the growing reputation and success of the college.

Resolved, That while we mourn his decease as of one whom we highly esteemed and honored, we tender to his bereaved family our sincere sympathy in their loss which is so unspeakably great, commending them to the gracious consolations of the Heavenly Comforter, who alone is able to support them in their sad bereavement.

Resolved, That the members of the board of trustees residing in this vicinity will attend the funeral.

At a meeting of the members of the Monroe county Bar, held at the Common Council Chamber, in ROCHESTER, on the 7th of December, 1872, on motion of Hon. ALFRED ELY, Hon. E. DARWIN SMITH was elected Chairman and F. A. MACOMBER was chosen Secretary.

Judge RAWSON moved that a committee of seven be appointed by the chair to present resolutions expressive of the sense of the meeting.

The following gentlemen were appointed as such committee : Hon GEORGE W. RAWSON, Hon. J. D. HUSBANDS, J. N. POMEROY, H. L. SARGENT, L. H. HOVEY, T. C. MONTGOMERY and GEORGE RAINES.

The committee retired to prepare resolutions, and during their absence Judge CHUMASERO spoke as follows :

Mournful, indeed, Mr. Chairman, is the event which has again convened the Bar of Monroe county. Sad enough is it, when we are called to deplore the loss of any friend or brother, but a loss like this seems to evoke our special grief. Judge Johnson, whom we all loved for his many and ennobling virtues, is dead. How were our hearts chilled, as yesterday we heard the "passing bell," in its funeral tones, proclaim the solemn truth that Johnson was dead! Truly, "Death loves a shining mark," and when this time the "insatiate Archer" sped the fatal shaft he chose no common victim. How little did we dream, when a few short weeks ago, we saw him in the full vigor of his manhood, strong in health and energy, that we should so soon be called to mourn him, dead. But his fate is our own; it comes alike to all; no power, nor place, nor strength, nor life, can stay its arm or parry its relentless blow. All must fall before it; all must die.

"Pallida Mors

Æquo pulsat pede, pauperum tabernas

Regumque turres."

Before the bier of him whom we now mourn, the voice of eulogy is dumb. His name is his epitaph. Those who knew him never can forget what "manner of man he was." As a judge, he was all that could be asked for; great in both mental and physical stature, he seemed peculiarly adapted to the position he had for so many years so ably and eminently filled. His legal ability was great; spurning the close technicalities of the law, when, in so doing, he was not compelled to violate any substantial principle, imbued with a stern love of strict justice, he delighted, during a trial, as it were, to dive into the very depths of the case, and bring up from intricacy and confusion, the very merits of the controversy. It was his aim and stern resolve that right should triumph, and many a time, when he was on the bench, did the trickster, confident of success at the commencement of a case, retire crestfallen at its determination. As a circuit judge, he was admirable, detesting fraud and chicanery in all its forms, and rendering them bare and powerless whenever he detected them, he was equally determined in the full enforcement of equity and justice. His uniform urbanity and kindness

on the bench, marked him as the true gentleman. No young or inexperienced practitioner was afraid to appear before Judge Johnson; timidity, awe, bashfulness, were disarmed, and the young lawyer in his novitiate had, before him, as sure a standing in court as the oldest veteran. Indeed, the remark was common that the senior members of the Bar looked upon him as a brother, the junior members as a father. He had a big heart, and it pulsated nobly; he had large sympathy, and he did not fail to express it. He told me once, when compelled by the duties of his station to pass sentence of death upon a convicted murderer, that sooner, almost, than do it, he felt as though he could cheerfully resign his office—and yet he was no man to falter in the stern path of duty. As a man, a citizen and a Christian gentleman, he was above reproach; indeed, integrity and pureness of heart were the grand and leading characteristics of his noble nature.

"None knew him but to love him,
None named him but to praise."

I am not permitted to draw aside, just now, the sacred veil of domestic grief, but I may say that, as a husband and parent, he was all a wife could pray for, or a child could ask. But death is not all darkness. We mourn—not he. Firm in the true Christian faith, he had assurance of eternal bliss, and the earthly, doubtless met the Heavenly Judge, not as a trembling culprit, but in the full welcome of a "good and faithful servant."

JAMES C. COCHRANE, Esq., said :

Mr. Chairman : Having been admitted to the Bar the year before Judge Johnson was elevated to the bench, having resided in the same district ever since, and practiced to some extent, in many of the courts in which he took a part, I have had an opportunity, in common with other members of the profession who have practiced at this Bar for a good many years, to understand intimately and well the judicial character and standing of Judge Johnson; and we come here to-day, not to pay him any empty tribute, or to speak as a matter of form, in regard to the really great man who has been suddenly called upon to leave the bench and the world. Judge Johnson had attributes which are requi-

site to every great judge. All concede him to have been, taken in almost every respect, one of the ablest judges we have ever had in western New York; and it is only proper to say, here, that where other judges stand so high this is saying a great deal of Judge Johnson. He had a fund of common sense; he was a practical man; he knew mankind, and he brought these qualities with him to the bench. No judge was ever truly great who had not a large fund of common sense, and the possession of this quality tended, in no slight degree, to render him eminent as a circuit judge. In the trial of causes, questions arise every hour, which a judge is called upon to decide without an examination of precedents, where he has to rely upon his own reason and upon his own common sense; and it is sufficient to say that many of Judge Johnson's decisions at the circuit were carried by appeal to the highest court, and that there is no judge whose standing upon the record, as reviewed by other courts, is better than his. We find in the reports of the higher courts a great many cases where Judge Johnson presided at the circuit, and where his decisions were affirmed and have become the settled law of the State. He was eminently fair in his charges to the jury; I have never heard any one complain of partiality. No one could say that Judge Johnson was upon one side or the other of a case, but it was his anxious desire to present the facts fully and fairly and honestly to the jury, thus securing to the parties, in an eminent degree, that justice which it should be the object of court and counsel to obtain.

Judge Johnson had another attribute, essential to every good judge; it was that of patience. There is reason for judges becoming tired, irritable, vexed, in the course of trials and arguments; but, at the same time, a judge must remember that counsel in a case understand the particular cause better than the judge. A case that has been in the hands of counsel for years, perhaps, carefully and thoroughly examined, is brought before the court; and it is not to be expected that the judge can know, in advance, what counsel are presumed to know, and therefore, although the counsel may be greatly inferior to the judge, yet there are few cases where the court cannot learn something in regard to the

particular case, from counsel who present it. Judge Johnson was always willing, as the gentleman who preceded me said, to listen to the youngest counsel who came before him—to listen patiently and attentively, and after having thus listened, he gave a decision which was generally satisfactory, and almost always founded upon reason.

Another quality which Judge Johnson had, was that of industry and punctuality. He was always present at the appointed time. I can scarcely recollect an instance when he failed in that respect, and we all know that, in his twenty-five years of service, he labored month after month, and year after year, almost without relaxation; and this arduous and continuous labor was probably one of the causes which has consigned him, perhaps even at his age, prematurely to the tomb. And yet, although Judge Johnson has been called from the bench a short time before the expiration of his term, he had arrived at that age when we could not much longer expect his services; and, after all, is it not as well that a man whose life has been such as his has been, should be called away in the very midst of his labors, dying like a war horse in the midst of battle? It is better that he should die thus, than that he should linger on useless, that it may be said of him that, during his whole life, from early manhood to ripe old age, he was useful in his day and generation. He was like a sheaf of corn fully ripe; he has been gathered by the Eternal Reaper. May he rest in peace.

The committee upon resolutions presented the following, which were read by their chairman, Judge Rawson:

The members of the Bar of Monroe county have received with great sorrow the intelligence of the decease of Hon. THOMAS A. JOHNSON, which occurred at his residence in Corning, on the 5th of December, instant, and have met to give some expression of their high appreciation of the character of the deceased and their sense of loss as members of the legal profession and as individuals. Therefore, it is

Resolved, That in the death of Judge Johnson the judiciary and Bar of this State have lost an eminent jurist, whose great legal attainments, sound judgment, clear and strong intellect, quick moral perceptions and generous sympathies peculiarly fitted him to discharge the important duties

of the high judicial office he has so long filled with such distinguished honor.

Resolved, That his untiring devotion to official duties through a long judicial career, his great purity of character and unbending integrity, always commanded our confidence, respect and admiration, and we commend his example as worthy of imitation.

Resolved, That in private and social, no less than in public life, his plain and simple manners, his unpretending modesty, his genial disposition and great kindness of heart, won for him the regard and love of all those who were honored with his friendship.

Resolved, That while we feel deeply the great loss sustained by the judiciary and the profession, and the loss which the community has sustained in the departure of one possessing all the elements of true Christian manhood, we can but express that deeper sense of loss felt by us in the removal of a dear friend whom we loved, and in whose wise counsel we have so long confided.

Resolved, That we tender to the family and friends of the deceased, as mourners with them, our warmest sympathy, in their great bereavement.

Resolved, That a copy of these resolutions be signed by the president and secretary, and transmitted to the family of the deceased.

Resolved, That a committee of three members of the Bar be appointed by the president to present these resolutions at the next session of the general term of the Supreme Court for the Fourth Department, and to ask that they be entered upon the minutes of that court.

J. D. HUSBANDS, Esq., said :

Mr. Chairman : By the death of Hon. Thomas A. Johnson, a justice of the Supreme Court of New York for the Seventh Judicial District, the Bar of Monroe county has sustained a loss which its members keenly feel and mourn as a personal as well as a professional bereavement. Elected immediately after the adoption of the Constitution of 1847, he continued on the bench by successive elections, during the remainder of his life, and survived all his cotemporaries as a justice of the Supreme Court. Judge Marvin ceased to be a justice of the Supreme Court in June last, and Judge Johnson was the last of that noble army of judicial men remaining upon the bench. The record of his judicial life for a quarter of a century in eventful times, and in educated commercial and agricultural communities, has become the valuable

and valued property not only of the citizens of this State, but of this country and of England and elsewhere, where the reports of our Supreme Court and of the court of *dernier resort* are cited by the Bar and accepted by the bench as high authority.

To the judicial learning of our times Judge Johnson has contributed his full share. His opinions indicate broad and comprehensive views of popular government, a love of virtue for its own sake, a detestation of vice in all its forms; sound scholarly culture; great industry and research; a judgment calm and nicely balanced, and an inflexible desire to do equal and exact justice with rigid impartiality. They also indicate logical deduction and arrangement, acute analysis and intellectual penetration, which enabled him with his sturdy and manly common sense to search out the right and vindicate the truth. A pure, noble, intellectual and cultivated judge has fallen, surrounded by multitudes who loved and honored him in life, and who venerate his memory as a bright and shining example to those who survive.

To our Bar Judge Johnson was more than the judicial officer. We mourn him as a devoted, large-hearted, genial personal friend. Always dignified, he was never austere. On the bench he maintained to us and to all men, the dignity and proprieties of the judicial station. Relieved from the bench, he was our companion, enjoying friends and friendships and social life with a zest inspired by a generous heart, full of kindest impulses. He loved and was loved. A commanding personal presence, combined with mental culture and fine literary tastes made him the accomplished gentleman. His uniform spotless Christian life gave beauty and tenderness to his social relations. His personal habits were singularly methodical, and were under the direction of life-long principles directing his daily conduct. In the tenderness of domestic refinement, Judge Johnson shone with a lustre all his own. This sacred temple, gladdened so long by the sunshine of his presence—now so darkened—we approach with reverent steps, and pause at its threshold to weep with its inmates, mourning their dead and also our dead. This whole Bar, I know, tenders to those within sincere condolence in their great bereavement.

I was struck with a remark, when I came in, that my brother

Cochrane was making, in regard to the peculiar qualities of Judge Johnson. One was his patience. He had what the Romans used to call "*mens sana in corpore sano*;" and there he sat, day after day, week after week, month after month, performing the labors and duties which usually cause so much strain upon the system. Another qualification was, he was willing to be convinced. I remember, once, with all the positive qualities of his peculiar mind—and strong in these qualities he was—upon the instant he formed his first impressions strong and clear, and upon the occasion to which I allude, the counsel stated to him that there might be a question, on a certain point, which he had overlooked. He settled back in his chair and said: "It never did hurt me to hear an argument, and I will hear what you have to say." After listening to the remarks and suggestions of counsel, he promptly, with that manly vigor of intellect which always characterized him, decided directly against his first convictions in the case. His heart had no taint of impurity upon it. He had what I call *mental integrity*. Give him a proposition, so that he had his premises, and with his clear method of reasoning, he would almost inevitably arrive at a correct conclusion. His was honest mental logic. He had no desire but to hold with untremulous hands the scales of justice, so that no man should be deprived of a right, and no man protected in a wrong. He stood among his brethren the stalwart, fearless, mighty judge—not, perhaps, the greatest among the great, but great among the greatest. He was, every inch and every fiber, a man; and when you say that, you have included all that God made of man. God had given him peculiar qualities to adorn the bench and to dignify it—by magnetic power to win men to him, and to command their respect, for all who came before him saw that he was honest, upright, able, ever dignified, striving to discharge his duties.

Such was Judge Johnson. We cannot pronounce his eulogy here to-day. It is natural that upon such a solemn occasion as the present, the sadness of our hearts should in a measure seal our lips from the utterance of a fitting tribute, but his memory will ever be cherished by all those who have had the pleasure of

knowing and loving, of honoring and reverencing our departed friend and brother.

GEORGE F. DANFORTH, Esq., said:

Mr. Chairman: I should be very sorry, even at this hour, after so much has been so well said and so sufficiently expressed in the resolutions that have been read, to have the meeting pass without paying the tribute I entertain for the memory of Judge Johnson. To have been a member of the Bar during the entire period in which Judge Johnson sat upon the bench, to have had occasion with greater or less industry to examine and study the opinions which he pronounced, from the first volume of the reports under the new Constitution to the last, to have seen pass away from our presence, first one and then another of the judges who, with him, entered upon the judicial career, has made an impression upon my mind which never can be effaced. Not many here, but some, will call to mind that, in this district, the bench was first illustrated and adorned under the Constitution of 1846, by Johnson, Selden, Maynard and Welles. We recollect that Judge Maynard died first, and after many years, passed from us Judge Welles. One only, survives of the four—Judge Selden, not occupying an official position at present, but having adorned not only the bench of the Supreme Court, but of the Court of Appeals. With the exception of Judge Johnson, up to the time of his death, no member of the original judicial force of this district remained in activity. The record of Judge Johnson's life will be found, not in any eulogy we may utter, not in any expression of esteem which may be heard in this district or department, but will be found in the sixty-two volumes of Barbour's Reports, with here and there an opinion in the New York Reports. With an industry which knew no abatement, Judge Johnson received, examined and disposed of every case which came into his hands, down to and including the last term of court at which he was present, held in this room. A similar record for a similar length of time, I presume, cannot be presented in the life of any judge.

We here feel his loss, not only as a professional, but as a per-

sonal friend. The gentleman who preceded me has referred to the band of judges who went on the bench in 1846. I have no doubt that their labors will compare favorably with those of any other judges who have ever lived in this or any country, for the same period of time, or the same number of volumes; and yet, many will remember with what doubt the system of our elective judiciary was adopted. We certainly, in these considerations, may find great cause for hope that in the continuance of the system we may seek other men equally entitled to the honor which we have been called upon, from time to time, to show to those whom we have already known.

That a judge was honest, and that he proceeded on his way faithfully and laboriously, we should be able to say of every judge; but that, in addition to all this, Judge Johnson should leave the feeling which is entertained by the Bar, is, I think, unprecedented. I have no doubt that the most sincere emotions of the heart are expressed in the addresses and resolutions which we have heard. For myself, I feel the loss of Judge Johnson deeply. That we may have as great judges, I trust we may believe; but it is not likely that, to the older portion of this Bar, another can come who will take the place in our affections which was occupied by Judge Johnson.

LYSANDER FARRAR, Esq., said:

I concur fully in the sentiments expressed in the resolutions, and in those expressed by each of the speakers who have preceded me. I was at the Bar, a young man, when Judge Johnson was first elected to the bench, and have known him, more or less intimately, during all that period. He was certainly a very remarkable judge. He was distinguished for all the great qualities which have been ascribed to him by the resolutions and by the speakers; but I think he was especially remarkable for the two qualities that have been adverted to—patience and integrity. His patience in hearing arguments, and in the trial of causes, was very remarkable. I never knew an instance when he showed any impatience, and there is no position, perhaps, in which a man can be placed which subjects that quality to a more severe test than that of a

judge attending the trial of causes. There is scarcely any eminent judge whose character has gone into history, who has not sometimes been liable to criticism, and whose conduct has not been justly criticised for its want of that particular quality, but I never heard of a criticism being made by any lawyer, or by any other person, upon Judge Johnson. Every member of the Bar who submitted the argument of a case to Judge Johnson was certain of two things—that it would be patiently and thoroughly investigated, and that the determination, whatever it might be, would be honest and fair. There have been other judges, perhaps, more eminent, in an intellectual point of view, than he; but in these other qualities to which I have adverted, which are of the highest importance, no other judge in this State, or in this country, ever surpassed him.

D. C. HYDE, Esq., said :

Mr. Chairman: As a junior member of this Bar, I am unwilling that the remains of this great man which lie cold in a distant county, shall be committed to the grave without an expression of the debt which I owe to him as one of the judiciary of this State. He was one of the first judges before whom I had the honor of practicing. The young men of this, and of every county in the district, are indebted to him for the kindness which he always extended to them. It seemed to me that he was unwilling that a cause should suffer because of the inability of the young man who had it in charge, and it was not an infrequent thing for him to suggest how a difficulty might be avoided. It is not every good judge, as every young lawyer well knows, who, whether he considers it his duty or not, will condescend to do that; and it seems to me that, when such a characteristic as that is manifested in a judge, the younger members of the Bar should recognize its value. I am unable, and I should not regard it necessary, to undertake to say anything with reference to the character and the judicial ability of Judge Johnson. It is enough for me to say that I knew the man, and I desire to express my thanks for the kindness which he always exhibited to me while I was practicing in his courts; and I believe there is no danger in

the elective system, as long as such men fill the bench, nor is there much danger to republican institutions while such men as he have the interpretation of the laws.

Hon. E. DARWIN SMITH, said :

I approve of these resolutions, and concur most heartily in all that has been said in them, and in the remarks of those gentlemen who have spoken in respect to Judge Johnson, his merits, his works, and his judicial character. They do him no more than justice, and so far as they express the feelings of the Bar, they are just and proper. But I feel a personal loss and bereavement in his death which cannot be felt, in the same degree, at least, by the other members of the Bar. He was my associate and friend for many years upon the bench—one who stood to me as a brother ; and his death comes very near to me. For seventeen years we have sat together in the courts, and have gone in and out together. We have sat, if not around the same council fires, around the same social and judicial boards in consultations and discussions in respect to questions of law affecting the lives, liberty and property of our fellow citizens. Our relations have always been most intimate, most kind, and most cordial, when we differed in opinion, as well as with my late brother Welles, who has gone before him. And I will say the same of all my brethren on the bench of this district. Though we have differed on questions of law, we never had differences that went out of the council chamber, and there was never any asperity or unpleasantness in any of our relations. Our discussions were always in kindness, and never did a discussion amongst us leave any feeling behind it, and scarcely a dissent. Judge Johnson was only intent that right and justice should prevail, and was ever open to conviction, ready to listen to the arguments of his associates, and to yield to their views when he thought they were right. He was not tenacious, although a decided man. In all these things I considered Judge Johnson a remarkable man ; and it is, perhaps, attributable to him and to our venerable father who went before him, that our relations were so pleasant.

Judge Johnson was ever particularly friendly to Rochester and

to the Rochester Bar. He frequently said to me that Rochester was one of his homes, and that he always felt that here he was at home and among his friends. He was particularly observant of the kindly manners and gentlemanly deportment and courtesy of the members of the Bar of this county among themselves, frequently mentioning it as a subject of gratification. I remember particularly his allusion to this subject some years ago, when on the occasion of the decease of the late William S. Bishop, it fell to my lot, as Presiding Judge of the General Term, to respond to some resolutions and remarks addressed to the court in respect to his memory, and to speak of his gentlemanly manner and his efforts to influence and promote kindliness and courtesy and good feeling among the Bar. Judge Johnson said to me that he had always observed with pleasure the gentlemanly deportment exhibited by the members of our Bar towards each other, and that he never had had an occasion to rebuke any of them.

The feelings which the Bar express I entertain most fully, and I have no doubt that the bench and Bar throughout this department and throughout the State feel that they have sustained a great loss in the decease of Judge Johnson. The resolutions presented and the addresses to which we have listened, all testify that the Bar of this county fully appreciate their loss.

The resolutions were unanimously adopted. Hon Henry R. Selden, George F. Danforth and William F. Cogswell were appointed as a committee to present them to the General Term.

At a meeting of the members of the Bar of Cayuga county, held at the Court House in AUBURN, on the 7th of December, 1872, DAVID WRIGHT, Esq., was appointed Chairman, and J. T. M. DAVIE, Esq., Secretary.

The Committee on Resolutions, consisting of DAVID WRIGHT, JOHN L. PARKER, CHARLES F. DURSTON, JAMES R. COX and THEO. M. POMEROY, reported, through Mr. Pomeroy, the following resolutions, viz :

Whereas, We have received with profound sensibility the sad intelligence of the death of the Honorable THOMAS A. JOHNSON, a justice of the Supreme Court of this District, and have left to us, as our only consolation, the consideration that death is the inevitable portal by which alone man can enter upon the life eternal. It is by the Bar of Cayuga county, in memory of one so cherished by them all,

Resolved, That while we are not advised of the history of the closing hours of our departed friend, we nevertheless know from his exemplary Christian life, that he died realizing the highest aspiration of dissolving humanity, that "He died the death of the righteous, and his last end was like his."

Resolved, That in paying this last sad and unsatisfying tribute to the memory of one who for more than a quarter of a century has walked with us in private life as a beloved friend and associate, and, in his public career, has exhibited before us at all times an unsurpassed purity and ability of judicial administration, we deeply realize the overwhelming loss of an eminent jurist and Christian gentleman.

Resolved, That we shall ever take a just and honorable pride, in the memory of Justice Johnson. He was placed in his high position, at the first election of judges, under the Constitution of 1847; and died, the last in official life of the long list of eminent lawyers who were elevated to the bench with him. Learning, dignity, purity, courtesy distinguished his entire official career, and at all times justified the wisdom of our choice. His purity of private life, geniality in social intercourse, great legal attainments, patience in the administration of justice, unbiased judgment, and incorruptible integrity were so fully and completely blended as to illustrate our ideal of an upright judge, whose large place in the jurisprudence of our State we know not how to supply.

Resolved, That in the earnest, pure, and laborious life of Justice Johnson, the Bar of this county have an example worthy their highest reverence and emulation; and that to improve the lesson he has taught, we will endeavor to advance the standard of professional learning, courtesy and integrity.

Resolved, That while we mourn for ourselves and for the stricken family, the departure of the beloved husband, father and friend, we rejoice in the example of such a life, and recognize the fact that for him "death has no sting, the grave no victory." He has gone in the fullness of years, with a great and laborious work accomplished, to his reward. We trust that the contemplation of such a life, may teach the value of those treasures of time which are imperishable, and of those virtues, which, planted here, become immortal with us.

Resolved, That these resolutions be published in our city and county papers, and that a copy be transmitted to the family of the deceased, in the hope that there may be found therein assurance of our deep sympathy with them, and of our honor and respect for the departed.

Resolved, That a copy of these resolutions be presented by the Chairman of this meeting to the Supreme Court at the next circuit, held in the county of Cayuga, and that he move that the same be entered in the minutes of the Court.

In presenting these resolutions Mr. Pomeroy said .

I move the adoption of these resolutions. I can only hope that they may, in some feeble way, express the real sentiments of the profession of this county. I know it is hardly proper for me to take up much time in a meeting like this, estranged as I am in my daily walks from the profession in which I once practiced so long. And yet I feel, on occasions like this, when, one after another, those before whom and with whom I have practiced are laid away in the grave, I have a right to renew my brotherhood with you ; and when my time shall come, and I shall be called away, I hope that the feeling of my brotherhood will remain behind with you.

Of all the men, Mr. Chairman, with whom I have ever been associated in my life, I have never met with one in whom the Christian graces were so rounded out and completed as in Justice Johnson. It seems eulogy to speak the truth of him. In him, the Christian graces were combined to a degree I never saw surpassed. He pre-eminently added to faith virtue, and to virtue knowledge, and to knowledge patience, and to patience temperance, and so on through all the graces to charity, which crowned them all. He was always dignified, and yet never severe. A pure Christian, and yet never ascetic. He fought not with the common weaknesses of the world, but he dealt with those vices which all men are expected to eliminate from their characters and lives. I doubt if there be one, who has grown up under the judicial administration of Justice Johnson in this district, who cannot bear testimony from his own personal experience to this, and particularly to the eminent kindness he manifested to young men rising up in the practice of the profession.

He was courteous to all, to old and young, learned and unlearned. He had a word of encouragement for all. I can bear my testimony, because I shall never forget as long as I have memory, the feelings he inspired in me at the first trial I ever managed in his court. It was at the trial of John Baham, a protracted and lengthy suit, at which I felt my whole future was at stake. If I managed that case well, I knew I had grounded myself in the profession. If I failed, then the predictions of those who, months before, had pronounced me incompetent to hold the office of District Attorney, by reason of youth and inexperience, would be verified. When the jury left their seats and retired to their room, in the midst of an intense stillness in the court room, Judge Johnson motioned me to the stand, and he whispered in my ear words of encouragement such as I can never forget. By that I was stimulated to further zeal in the profession. I felt a gratitude to the man, which has but grown and been strengthened by the kindness of later years.

Justice Johnson combined so many excellences, I repeat, that it seems almost eulogy to speak the truth. We ought not only to remember him but to study him. For thirty years, in the political world, our eyes had been tending, in peace and in war, towards the one great arch enemy of American unity and American growth, the system of American slavery. We followed it through peace. We followed it through war, till at last it fell, and fell forever from American history. But while we were engaged in fighting the great arch enemy of our country, another, subtler and equally dangerous had grown up, beginning in the lower walks of political life, reaching into our legislative halls, and spreading till its slime reached even the ermine on the judicial bench. I know what I say, for I have seen it. I have been in it. I know it. That corruption of the judiciary of the city of New York, which required the strong arm of impeachment to remove, had its origin in the Bar. Those orders, injunctions, and judgments, which have been the stench of our judiciary system for the last few years were covered by the mantle of lawyers, eminent to-day in the profession, who would be shocked if their integrity should be questioned. They have been misled by the Bar, and I

say that purity of the bench is to be first found in the purity of the Bar. Through all this period Justice Johnson sat on the bench, and I do not believe that the man lives who ever spoke of him, as, in thought, word or deed, biased in judgment by personal favor or any consideration unworthy of his position.

Now, I hope, that, as far as the limited sphere of our usefulness goes, the life and death of a man like Justice Johnson may not be lost upon us, and that, as is said in one of these resolutions, in the lessons of his life we may learn to strive for a higher standard of moral excellence in ourselves. With these remarks, I again move the adoption of the resolutions.

JAS. R. COX, Esq., spoke to the resolutions as follows :

MR. CHAIRMAN : I cannot help saying a few words on this occasion, in view of that which is forever past and irretrievably gone from our profession. Our dependence upon Justice Johnson, as a valuable judicial officer, was very great. He never disappointed us on a single occasion, when a term of court was appointed to be held here. We were never disappointed, when we asked for a fair, impartial trial in any case before him. It seems to me, that, deduct Justice Johnson from our district, and it almost makes one willing, as brother Allen and brother Pomeroy have done, to quit the profession.

The experiment of an elective judiciary is not yet wrought out in his district. In the particular instance of Thomas A. Johnson, the choice fell on a fortunate selection. But somebody has said that in an absolute monarchy, he who is truly a father to his subjects is one of the greatest enemies to mankind. For that is made popular by an excellent selection which is abused by tyrants. Justice Johnson was always kind, warm hearted, considerate, patient, forgiving. The Christian graces shone in all his deportment. He was not a man favored by fortune. His early days were spent as were the days of our late lamented chief magistrate. He swung the axe for his living. With difficulty he acquired the elements of a knowledge of the law. He commenced practice under unfavorable circumstances. He had had very little intercourse with refined society in his early years,

and we could all see the restraint and lack of freedom engendered by that misfortune. But over those obstacles he triumphed, and he became as fine a specimen of the candid, Christian gentleman as I ever saw. I hazard nothing in saying that, of all others, he was the model and favorite judge of western New York. And I am doing no injustice, in so saying, to the many distinguished men who fill places on the bench in this part of the State. They all will unite in saying as I do.

He was most considerate to young men. I may be pardoned in stating my own experiences, as brother Pomeroy has done. I wanted to get a writ of certiorari. I was a beginner in the law and had a highway case. I was told I must get the writ at court, which was then being held at Lyons. I went there. I was not acquainted with Justice Johnson. I approached him with awe. After dinner, I took advantage of his being in his room. I went to his room, and tapped at the door. I was admitted and asked if I could have his attention for a moment. Oh, yes, he said. I told him in an awkward way that I wanted a writ of certiorari, supposing he would sign it right there. He told me he never granted common law certiorari sitting in Chambers. I must make my application in open court. He talked pleasantly, looked into my papers, and told me to come into court after dinner and make my application, and state what I wanted. I was encouraged by his patience and pleasant manner. I went into court and felt as if I was addressing a friend. From that day to this, Justice Johnson has always been to me equally as kind and patient, and, on one occasion, he was required to exercise on my account the Christian virtue of forgiveness. We do well to remember his virtues. We can learn of him. Who ever heard him speak harshly from the bench? Who ever knew him to take advantage of his position to fling a cutting repartee at a member of the profession?

He ever discharged his duty with a profound sense of responsibility. I sat here as John Baham rose, in obedience to the order of the court, to receive his sentence. I shall never forget the faltering accents with which he pronounced that sentence. He seemed much more affected than the prisoner. (Mr. Allen—

"He dropped his head down and cried after it.") He had a world of sympathy and ever sought the advantage of mankind. In respect to the temperance question, he went further than most of us thought wise in our day. But he erred always on virtue's side. I think I cannot point to any member of the Bar in my acquaintance, who, having passed away, presents so spotless a record or so noble and useful a life as Thomas A. Johnson.

WM. ALLEN, Esq., said:

It was my intention, Mr. Chairman, to have said more than I shall now do, because the resolutions so fully express the sentiments I had intended to express. There is but little left for me to say. The eloquent language of the gentlemen who have preceded me fully expresses my sentiments.

Judge Johnson came upon the bench of the Supreme Court, the first year after my admission, so that my whole professional life was associated with him. He always showed great kindness and consideration to the members of the Bar, and especially to the younger members of the Bar. He was patient and learned. He was my ideal of a lawyer and a Christian gentleman. He was affectionate. He was strongly domestic in his feelings. In other years, when I was in active practice, Judge Johnson seldom held a term of court here without spending an evening or more at my house. I saw much of him socially. It was his sociability and courtesy that endeared him to all. In the language of one of the resolutions, the example of such a life should elevate us as lawyers—should elevate us as men and as citizens. Such a career is open to every young man entering the profession. Is it fully appreciated? Is the feeling that, to become a lawyer, one becomes a member of a learned profession with opportunity for the highest culture and the best association, fully appreciated by the present generation of younger lawyers. It does not seem to me that there is an elevated *esprit du corps*.

The cultivated Christian lawyer is the highest type of manhood. It should make the courteous gentleman. It seems to me that these are the lessons which the life of Judge Johnson has taught us. I trust it may make such impressions upon all of us.

As I look back and recall some of the wrangles at the Bar which I have witnessed, they seem altogether unbecoming before such a man. It should have rebuked them into silence and self-respect.

Like Mr. Pomeroy, though not in practice, I am still a lawyer and have a strong feeling of brotherhood with the Bar.

I know of no higher ambition than to be a respectable and respected lawyer. And I am largely indebted to Judge Johnson for the development of this feeling.

WARREN T. WORDEN, Esq., said :

Scarcely anything farther can be said of Judge Johnson than has already been said. I have, on several occasions, noticed the exhibitions of his kindness, but on no occasion, I think, did it strike me more forcibly than on presenting to him the resolutions of the Bar on the death of George Rathbun. He not only showed his feelings, but expressed them. He related the reminiscence, at that time, that when he first came to Auburn, and held his first term of Court here, the first cause was tried by Mr. Rathbun.

One thing in Judge Johnson's life, perhaps, is worthy of mention. In all his judicial career he never held a term of court in the city of New York. He had a dislike for going there, which he expressed. He often spoke about the extra fee allowed to justices who went to the city of New York. He did not see how it could be paid, under the Constitution. His salary was fixed at so much. The extra allowance was \$10 a day. He never went and never took the extra allowance.

DAVID WRIGHT, Esq., said :

I can most conscientiously endorse all that has been said in regard to Judge Johnson. I knew him probably earlier than any person here. We were admitted in the same class, in 1832. I knew him very well after that time. As early as 1843, and before he became a judge in the Supreme Court here, I had occasion to be with him in Corning professionally. I was well acquainted with him to the time of his death. I have never

known him to fail to attend a circuit when assigned to him. When a circuit or General Term was assigned to him he was always there. He did his duty faithfully, and even the duty of other judges. As Mr. Worden has remarked, he never went to New York. When others went to New York, he took their places here. I never heard any lawyer express regret that Judge Johnson was going on an old circuit here. So far as I have heard, it has been the universal wish of the Bar that Judge Johnson *might* be on hand when assigned to the circuit. All had entire confidence in him. Of course, we knew he was liable to err, for he was mortal; but we were always sure of a fair hearing, a due consideration and just judgment, as he understood the case. And he was generally right. I doubt if any judge ever sat on the bench of the Supreme Court whose judgments and decisions were less seldom reversed than his. He did as much to establish the law on a sound, just, equitable basis as any man living in the State of New York. We have always been particularly fortunate in this district, in the election of judges, and if you young gentlemen here are as fortunate in this respect as we of the elder branch, you will be fortunate indeed. It will not be long, perhaps, before all the old stand-bys of this Bar will pass away. We cannot all hope to leave so bright a record as Judge Johnson, but we hope that the younger members of the Bar will benefit by his example and forgive the imperfections in ours.

The resolutions were then unanimously adopted, and the meeting adjourned.

The following is a portion of the remarks made at the funeral of the deceased, by Rev. WM. SHELTON, D. D., of Buffalo:

"Virtue, worth and true dignity cannot pass before our eyes without leaving a blessing. Our venerable brother in Christ has long had his dwelling among those who are now before me, and in the higher positions of the world he has long been distinguished. It is a satisfaction to be able to say of him, in the midst of so much that degrades life and dishonors it, that he has lived, as far as it is ever permitted, an unsullied life—a life of integrity, of

real and unfeigned worth. Industry, without which the highest intellect fails, has distinguished him; through all the periods of his career no labor deterred him—no effort was too great or too arduous. His sense of justice and his views of the right are profoundly stamped upon the minds of those who have been under his influence or been witnesses of his conduct, of his decisions as a jurist or his conversation as a man, and it is not too much to say that he has not left behind him one whose reputation for integrity, ability and moral worth is superior to his own.

In an age, such as this, when even the judge's ermine is sometimes stained and soiled; when corruption stalks abroad, and wealth is openly amassed at the expense of truth and honor, it is a refreshment to any mind to look upon such a portrait as that of this unsullied judge; this high-toned, manly, grave and dignified jurist, who for a quarter of a century has commanded the highest respect and consideration of those whose interests were entrusted to his keeping.

It is a privilege to be allowed to dwell upon his virtues—his unpretending, modest, gentle and considerate life. He was always ready to aid in any noble enterprise, always ready to carry forward designs which were promotive of the public good. He mastered that selfishness which is so wont to man, the characters of those who think only of their own advancement or their own gain.

It is needless to say, in a community which has witnessed his life's actions, that he was just not only as a judge, but as a man, in the daily intercourse of life—or that he was an example of temperance, of moderation, and of purity—in *every* sense of that great word. As a churchman, he was honored by the continued votes of his friends; and always attended to the duties which devolved upon him as a representative in the general council of the church. *Here*, he never forgot his duty, or the interests of the body of which he was a member.

The venerated De Lancey held him in high consideration; and I know that our golden tongued Bishop will feel a pang of inexpressible anguish, when he learns that we have, in his absence, consigned to the earth the dead body of his honored, trusted and beloved friend.

This whole community will mourn the loss of one who has been to them a friend, and an example.

His associates, and brethren of the bench and of the Bar, will bear in their hearts memories of his excellences, which can but stimulate them to nobler, higher, and still higher deeds of excellence.

I shall conclude these imperfect words by reminding those who hear me, that at the base of all these excellent qualities, lay concealed, as it were, from outward view, a deep and abiding sense of Christ and his holy religion. Nothing but that faith which Christ came to proclaim—nothing but Christ and Him crucified can produce these virtues, this purity and this worth! All of them are the offspring of the gospel of the Son of God. They have their origin in heavenly truth, and that truth is only to be found in the character and precepts of the Christ of God.”

MEMORANDUM.

An obituary notice of the late Justice HOEZNBOOM, prepared by an intimate friend of the deceased, accompanied by a report of the proceedings of the Bar-meetings, will appear in Volume 64.

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A

ACCORD AND SATISFACTION.

1. At a meeting of a religious society, B., the treasurer, being present, the pastor stated that he was authorized by B. to say to the society that there was a large deficiency in the revenues; that his accounts were not made up, and he could not state the exact amount; but that if \$2300 was raised, he, B., would accept it in full settlement of his accounts against the church. The society was then called upon for subscriptions, and the required sum was raised and paid to B. *Held* that this was a good accord and satisfaction. *Brett v. The First Universalist Society of Brooklyn*, 610
2. And that the payment of \$2300, on behalf of the society, to B., under an agreement that it should be received in satisfaction of a demand uncertain in amount, operated as a full and final release of such demand. *ib*

See REFERENCE, 2.

ACCOUNTING.

See AGREEMENT, 1.

ACTION.

1. The general rule is, that for wrongs against the public, whether actually committed, or only threatened, no private action can be maintained. *Ayres v. Lawrence*, 454

2. As an injury affecting a whole community, when committed affords no ground of action to an individual, so neither can an individual maintain an action to restrain its commission when only threatened. *ib*

3. The interests of one or more individuals, as residents and tax-payers, in and of a municipal community, whether city, county or town, do not authorize the maintenance of an action to set aside, or prevent, illegal acts which may result in increased taxation or other burdens and inconveniences, to which all the members of the community are alike subject. *ib*

4. An act likely to produce taxation is not a matter of private or individual concern. *ib*

5. An action by a town officer of one county, against a town officer of another county, where the plaintiff sues and the defendant is sued in his official capacity, cannot be commenced before a justice of the peace of either county. *Lapham v. Rice*, 485

6. Nor can such an action be tried in the circuit court of either county, though originally commenced in the Supreme Court, if the objection be taken at the proper time and in the proper manner. *ib*

See JUDGMENT, 2.
JURISDICTION.

ADVERSE POSSESSION.

See LANDLORD AND TENANT, 2, 3, 4, 5, 6

ADVERTISING.

See NEW YORK, (CITY OF,) 1.

AGREEMENT.

1. On the 19th day of September, 1865, the defendant executed his promissory note to D. for \$150, payable, with interest, two years after date. On the 15th of November, 1865, the defendant executed another instrument, by which, for and in consideration of a certain sum of money, together with all claims or demands that D. held against him, bearing date November 15, 1865, bound himself, his heirs, executors, administrators and assigns, to support D. during his natural life. In an action by D.'s administrators upon the promissory note, *Held* 1. That the obligation contained in the instrument dated November 15, was one that could be enforced, if the defendant refused performance, or damages for non-performance could be recovered. 2. That in the absence of any evidence upon the subject of performance or non-performance, the court must presume that was not a point, in the case; or, if it was, then the burden of proof was upon the plaintiffs. 3. That the language of the agreement, of November 15, 1865, showed that the parties had an accounting, on that day; and that the legal presumption would be that such accounting included all prior liabilities. 4. That such agreement, for its consideration, included the note sued upon, as one of the claims or demands which D. held against the defendant at the date of the agreement. And that the accounting then had, between the parties, was presumptive evidence of a settlement of all demands, including such note. *Dutcher v. Porter*, 15
2. A contract, made by the sole trustee of a school district, with an individual to teach in a common school in said district, for a period extending beyond the trustee's term of office, is valid, and binding upon his successor in office. *Gillis v. Space*, 177
3. The law imposes upon a party subject to injury from a breach of contract by another, the active duty of making reasonable exertions to render the injury as light as possible. And if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him. *id*
4. Where a contract was made, by the trustee of a school district, with the plaintiff, by which the latter was engaged to teach in the principal department of a common school in said district, for the term of one year, and such contract was broken by the trustee, by his refusal to permit the plaintiff to enter upon or perform her duties as teacher; it was *held* that the violation of the contract, by such trustee, and the plaintiff's offer specifically to perform, *prima facie* entitled the latter to recover the contract price, and cast upon the defendant the burden of proving that by reasonable exertion the plaintiff could have obtained other like employment in the vicinity of the place where the contract entered into was to be performed. *id*
5. *Held, also*, that it was the duty of the plaintiff to make a reasonable exertion to secure another school, and not remain idle for a whole year, awaiting a call from other districts. But that, to make a case for mitigating damages, the defendant was required to prove that, by making such efforts, employment could have been secured, by the plaintiff. *id*
6. In an action upon such a contract, brought to recover the wages therein agreed to be paid to the plaintiff, the defendant proved that, in general, the schools in the town and neighborhood were not taken, on the day when the defendant refused to allow the plaintiff to enter upon her employment; also the compensation which was usually paid for teaching the common schools in the several districts of said town; and asked the court to submit to the jury, as a question of fact, in mitigation of damages, whether the plaintiff could not have obtained, by the use of due diligence, other employment of the same general nature, and in the same vicinity. *Held* that the court properly refused to submit the question to the jury, upon that evidence. *id*

7. *Held, also*, that in such action, the defendant should have been allowed to prove, in justification of his official act, and in bar of a recovery, that the plaintiff was incompetent to teach the school; notwithstanding she had procured from the proper district school commissioner a certificate of her qualifications to teach.

ib

8. By a contract, in writing, dated March 29, 1871, K. of the first part, for the consideration therein specified, to be kept and performed by V. of the second part, agreed to sell to V. certain premises therein described, for the sum of \$2000, to be paid as follows: \$600 on or before the 10th day of April then next, and \$1400 to be paid in three equal annual payments, with annual interest. And it was mutually agreed "that at the time of making the payment of the sum of \$600, and on or before the first day of May next, the said party of the first part shall convey the above described premises to the said party of the second part, by a good and sufficient deed, * * and take back from said second party a mortgage on said premises, to secure the payment of the said sum of \$1400, upon the terms above named;" and that V. might enter into immediate possession. V. took possession, and, on the 12th of April, tendered \$600, with two days' interest, to K., which he refused to accept. On the 17th V. prepared a bond and mortgage, and tendered it to K.; and presented a blank deed for him to execute. He refused to accept the one, or execute the other. In an action by the purchaser, for specific performance, *Held*, 1. That the fair and reasonable construction of the agreement was, that the making of the first payment, and the delivery of the deed, were to be concurrent acts; such being the manifest intention of the parties. 2. That inasmuch as the clause fixing the time for the delivery of the deed named, first, the very day previously specified for making the first payment, (April 10th,) and, secondly, another day, ("on or before the 1st day of May next,") in order to give certainty to the contract, and enable the court to determine the rights of the parties, under it, one of the days named must be regarded as unintentionally

inserted. 3. That good sense, as well as the justice of the case, clearly indicated the day last named as inserted by mistake; and that after making the first payment of \$600, the remainder of the purchase money was to be secured on the land by bond and mortgage bearing interest from that day, and payable in annual installments on that day.

4. That the covenant to pay, and the covenant to deed, were dependent obligations, and each was a condition precedent to the other. That the consideration for the payment of \$600 of the purchase money was the delivery of the deed, not the vendor's promise to deliver a deed. 5. That the plaintiff was not in default, in not paying the \$600 on the 10th of April, for the reason that the defendant did not have in readiness his deed, and was unwilling, then and there, to convey the premises, as promised in his covenant. 6. That neither party was, either in law or equity, in default, until the other offered to perform his part of the agreement, in full. That both failing to perform their mutual covenants on the contract day, each impliedly waived strict performance as to time, and the agreement remained in full force and effect. 7. That the plaintiff had the right to demand of this court the aid of its equity powers, to enforce a specific performance of the agreement. And that he had made a case for the recovery of damages, in an action at law. *Van Campen v. Knight*, 205

9. A note for \$500 was given to the plaintiff by the defendant and his son C., in part payment for a scow, purchased by C. of the plaintiff. When it matured, C. had sold the scow to H. and taken a personal mortgage conditioned to pay the note. It was then agreed between the plaintiff and C., subject to the defendant's approval, that if C. and the defendant would give a new note for one half the amount due upon the old, and procure a release from H. of all claims against the scow, and one half of all other claims, the plaintiff would pay one half of all such claims, other than those of H., take back the scow and surrender the \$500 note. This being communicated to the defendant, was assented to by him, with this quali-

fication; that the defendant should guaranty the new note for one half the amount of the \$500 note, and sign an agreement in relation to the payment of the claims on the scow. The new note was drawn by the plaintiff and signed by C., and a guaranty not expressing any consideration was signed by the defendant, and an agreement made, by him, to pay charges against the scow; and the plaintiff indorsed the amount of the new note on the \$500 note. *Held*, 1. That the new agreement was substituted for the old note; and if the defendant had fulfilled that agreement, on his part, he was relieved from liability on the \$500 note. That if he had not, then he was liable, upon the new agreement, for whatever damages the plaintiff had sustained thereby. And that it was only in the contingency that the defendant broke this contract that the plaintiff could be remitted to his remedy on the \$500 note. 2. That giving the agreement to pay the charges on the scow was a performance of the clause of the new contract in relation thereto. 3. That the plaintiff was entitled, under the contract, to a valid guaranty of the new note; and the defendant was not released from liability if the plaintiff, through mistake, failed to draw a guaranty binding in law. 4. That the fair construction of the contract being that the defendant should not only sign a guaranty, but one that could be enforced in law against him, the only effect that the plaintiff's mistake could have would be to excuse the defendant from liability for a breach of contract, until demand was made upon him to execute a valid one, and refusal to comply. 5. That the defendant being a joint debtor with C. upon the \$500 note, when negotiations were entered into to pay that debt, they were entered into to pay his own debt, and not the debt of another. And the defendant being thus legally liable, before signing the guaranty, for the whole debt, he was therefore guarantying his own debt, and not the debt of another person. And the guaranty was valid and binding, although it expressed no consideration. 6. That from the plaintiff's omission, throughout the trial, to allege that the scow had not been

returned to his possession, and from the allegation of a breach of another and different clause of the contract, the court was bound to consider the case as if a delivery of the scow to the plaintiff had been proved. 7. That the plaintiff, having received and retained a part of the consideration of his promise to release the defendant from the \$500 note, he could not keep it and still recover the whole amount of such note. 8. That he was entitled to recover only so much as he had lost through the default of the defendant to fulfill his part of the agreement. And that was limited to the new note; all the rest having been performed. That that note, and the interest thereon, formed the measure of damages. *Ellenwood v. Fultz*, 321

10. On the 1st of February, 1862, the defendant executed an agreement in writing, under seal, by which he acknowledged the receipt of \$450, from D., to be held by him as trustee, for the period, in the manner and upon the conditions and trusts therein mentioned, or until the trust was revoked. By this agreement, the defendant promised to invest the money, and pay the interest to the plaintiff annually, and that on the 15th day of July, 1864, the said sum of money should be paid to the plaintiff as her own property; provided that before that time no proceedings should be instituted against D. on account of any alleged injury to the person or character of the plaintiff, either civil or criminal, or in her own behalf, or in behalf of the people; and that the plaintiff should execute a release of all demands. It was proved that on the 2d of January, 1862, D. was arrested and held to bail upon a warrant, charging him with the criminal offence of having assisted in procuring an abortion of a quick child, upon the person of the plaintiff, on the 5th of July, 1861. It was claimed that the consideration of the agreement in question was that such criminal prosecution should be abandoned, until after the statute of limitations had attached. *Held*, 1. That this agreement being for the suppression of criminal proceedings which had been instituted against D., tended to obstruct and interfere with the administration of

public justice and of the laws, and was utterly void. 2. That the plaintiff could not be permitted to prove, in opposition to the express stipulation of the agreement, that it was not a part of the understanding that the criminal proceedings should be abandoned. 3. That the claim that the contract had been executed could not be supported; the action being brought to enforce it, and for that reason the court could not aid the plaintiff; although it would not by any means assist the defendant, should its aid become necessary to enable him either to execute, or to defeat, the trust. *MULLIN, J.*, dissented. *Bettinger v. Bridenbecker*, 895

See ATTESTING WITNESS.
COMMON SCHOOLS, 2.
EVIDENCE, 8, 9, 10.
WARRANTY, 8.

AMENDMENT.

The power of amendment being given to referees, with large discretion, the court will not disturb a judgment for a refusal of a referee to allow an amendment of an answer, so as to admit evidence of a defence not set up therein, after a lapse of five years since the matters sought to be introduced occurred. *Brett v. The First Universalist Society of Brooklyn*, 610

See JUSTICES' COURTS, 1.
REFEREE, 2.

ANSWER.

1. Where facts were stated, in an answer, as an avowed "second defence," and at the close of the statement of the defence, the answer contained these further words: "Which sum the defendant will recoup against any demand of the plaintiffs in this action;" *it was held* that there was no validity in the objection that the defendant could not avail himself of the fact, thus stated, except for the purpose of extinguishing the plaintiffs' demand. That under the provisions of the Code, the facts being stated which would be necessary to enable the defendant to give evidence of his defence, it would be

the right, as well as the duty, of the court to give such judgment as he should establish, by proof, he was entitled to. *Wilder v. Boynton*, 547

2. The omission, by a defendant, to plead the appointment of a receiver of the plaintiffs' assignor, in proceedings supplementary to execution, prior to the assignment by him to the plaintiffs, of the demand in suit, will uphold a decision of the referee excluding evidence of the supplementary proceedings and the appointment of a receiver. *Brett v. The First Universalist Society of Brooklyn*, 610

3. The ownership of the demand in suit by the receiver should be affirmatively stated, in the answer. Evidence of that fact cannot be introduced to sustain a denial that the demand has been assigned to the plaintiffs and that they are the owners thereof. *ib*

4. In a suit brought by the assignees of a demand, perhaps evidence tending to show that the assignment was without consideration, or that the assignor has made no valid transfer, is admissible to sustain a denial that the demand has been assigned to the plaintiffs and that they are the owners; but not to prove the ownership of the demand by a third party. *Per LEONARD, P. J.* *ib*

APPEAL.

1. Where, at the trial, a party assumes and treats the questions raised as being questions of law, to be decided by the court, and they are passed upon and ruled against him, he cannot, on appeal, insist that the questions decided by the court involved a question of fact. *Dutcher v. Porter*, 15

2. The plaintiff, in a case originating in a justice's court, recovered a judgment for \$95 damages. The defendant appealed to the county court, specifying in his notice of appeal, among other grounds of error, that "the judgment should have been more favorable to him in this particular, to wit, that said judgment should not have been for more than \$25 damages, besides costs." The plaintiff served no offer to modify the

judgment. The plaintiff recovered but \$49, in the county court, and that court allowed him costs; and the Supreme Court, on appeal, affirmed the judgment of the county court. *Held*, on a re-argument, that the judgment of the county court, so far as it adjudged costs to the plaintiff, was erroneous. *Younghouse v. Finger*, 299

3. *Held*, also, that the notice of appeal was a sufficient compliance with the amendment to section 371 of the Code, made in 1866, which provides that if the appellant "claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount." Yet it seems that in bringing this class of appeals, greater caution should be observed, by following more closely the language of the statute, instead of adopting the form of notice in this case as a *good* precedent. *ib*

4. Liberality, in the construction of that statute, should always be indulged; especially in a justice's court proceeding. The notice is sufficient if it gives the respondent notice of the *particular* complained of, in the amount of the judgment. It is then for the respondent to correct it. *ib*

5. On a new trial, the party respondent, on appeal from a justice's court, cannot be confined to the objections he made in the justice's court; those objections not being in any manner made known to the appellate court. *Lapham v. Rice*, 486

6. On a new trial in the appellate court, as upon any other new trial, the parties are entitled to take any ground permissible under the pleadings. *ib*

See JUSTICE OF THE PEACE, 1, 2, 4.
SUPREME COURT.
VERDICT, 1.

ASSAULT AND BATTERY.

1. In an action for assault and battery, the defendant offered to prove, in mitigation of damages, a series of provocations, repeated and continued from day to day; and that every time the parties met, the plaintiff

took the occasion to insult the defendant with most opprobrious language, and to such an extent as to render him wild, excited, frantic and partially insane. Also, that the plaintiff had committed a most grievous injury affecting the domestic relations of the defendant; which was one of the insults with which the latter was taunted. This evidence being objected to, the judge ruled that he would allow the defendant to show anything which took place on the day of the assault, or the day before, but not what took place several days before; as in that case the defendant had time for his passions to cool. *Held* that the ruling was erroneous; and a new trial was granted. *Dolan v. Fagan*, 78

2. Where there has been a determined design to continue and repeat insults for the very purpose of exciting another, and to keep him excited, and this course of conduct is repeated every day, and on every occasion, the case is not to be controlled or limited by a few hours, or by a single day. *ib*

3. Each case should be controlled by its own peculiar circumstances. The question should be, not how many hours have elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party has had a reasonable time to cool his blood. *ib*

4. If it was the plaintiff's design to provoke, excite, irritate and insult the defendant on every occasion of their meeting, and by a series of such irritating and annoying provocations, he kept the defendant in an excited and frantic state of mind, it is his own fault that the defendant was not cool. *ib*

5. The jury ought to be permitted to hear the nature and extent of the provocation; to hear and to know how much of the beating complained of, was, if not deserved, at least caused by the provocation given. *ib*

ASSESSMENTS FOR STREETS &c.

1. The statute in relation to assessments for paving streets in the city of New York only requires the reso-

- lution of the common council, authorizing such an assessment, to be published once prior to its passage in each board; and that the resolution shall not be passed until at least two days after such publication. *Matter of Bassford*, 181
2. Where the board of aldermen received a communication from the Croton board pointing out defects in a resolution for paving, which the board had adopted; to which communication was appended an amended resolution proposed for adoption in the place of the former resolution; and the same were published by the board, in the usual manner; *Held* that the object of the law being to provide for notice to persons interested, that such a proposition was before the board, that object was as fully attained by publishing the resolution as recommended by the Croton board, as it would have been if offered by a member of the board of aldermen. *ib*
 3. It is not a valid ground of objection to the confirmation of a report of commissioners of estimate and assessment in proceedings for opening a new park, that the lands embraced in such park are not all contiguous; that is, that there are intervening blocks and spaces not taken; where such intervening spaces are not so large as to interfere with the integrity or continuity of the plan, or the equalizing of the assessments. *Matter of the Commissioners of the Central Park*. 282
 4. Nor is it any ground of objection to such report that the commissioners have regarded the land of a railroad company, lying within the designated limits of the new park, and occupied by the company for its track, as not having been taken for the use of the park, and as not requiring any estimate for damages, or assessment for benefits. *ib*
 5. The use of the line of the track by a railroad company is a franchise granted by law to such company, in the nature of a contract, and as such, inviolable, except under the general power reserved to the State, to alter or repeal the company's charter. *ib*
 6. Where the statute, under which commissioners of estimate and assessment in the matter of widening a street are appointed, expressly authorizes two of the commissioners to act, and declares that their acts shall be as valid as the acts of all, a report signed by two of them, only, is valid. *Matter of Broadway Widening*, 572
 7. The provision, to that effect in the act of 1813, is not abrogated by section 7, article 1, of the constitution of 1846, which requires compensation to owners of property to be ascertained by a jury, or by not less than three commissioners. *ib*
 8. Notwithstanding the constitutional provision, the legislature can authorize a decision by a majority of the commissioners. *ib*
 9. A provision in a statute authorizing the widening of a street, which requires that the report of the commissioners shall be made within six months, is to be deemed merely directory, and not a matter of jurisdiction. If the report is not made within the time, jurisdiction is not lost by the delay. *ib*
 10. A clause in a statute by which a majority of the new commissioners of estimate and assessment, therein directed to be appointed by the court, are required to be other than the former commissioners, is not to be construed as a violation of the constitutional provision giving the appointing power to the court. *ib*
 11. A statute authorized the court to refer the matter of widening a street to new commissioners, after vacating a former order of confirmation, on a notice of five days. The court having, under this act appointed commissioners and one of them having declined to act; *Held* that the same court had power to supply his place without notice of the motion for an appointment. That want of notice could be only an irregularity. *ib*
 12. When the value of land taken for a street improvement is awarded to the landlord, and the value of the buildings thereon is (according to the provisions of the lease) awarded to the tenant, this makes

the total value of the property, and nothing more can be required. *ib*

18. A minority report from the commissioners cannot properly come before the court. There can be only one report, and that is the report of the whole, or a majority, of the commissioners. *ib*

14. By an act, passed February 27, 1871, the legislature authorized the court to vacate an order of confirmation, and to refer the matter back to commissioners. The act directed the commissioners to amend and correct said report, or to make a new assessment, in whole or in part, as the court should direct. The act further authorized the commissioners, in making such corrected or new assessment, to assess any and all property which they might deem benefited, and repealed the former limitation. (*Laws of 1871, ch. 57, § 4.*) The court, by an order granted April 8, 1871, vacated the order of confirmation, and directed the new commissioners to amend and correct said report and to make a new assessment in whole. *Held* that whatever the language of the order was, the act was plain; and that the commissioners could go beyond the former area of assessment. *ib*

ASSIGNOR AND ASSIGNEE.

See JURISDICTION.
LEASE.

ATTACHMENT.

See SHERIFF.

ATTESTING WITNESS.

1. Where one who has signed his name as an attesting witness to the execution of an instrument, did so without the knowledge or consent of the parties, the instrument may be proved as if there were no subscribing witness. *Sherwood v. Pratt, 187*
2. The signature of a subscribing witness is not *conclusive* upon the parties to the instrument. It is only *prima facie* evidence that the witness was

called in by them; and the presumption arising from it may be contradicted. *ib*

3. And for that purpose, parol testimony may be received; the object of the proof not being to contradict, or vary, the written agreement, but merely to show that its execution was not attested in a particular way. *ib*

See EVIDENCE, 6.

ATTORNEY.

See CRIMINAL LAW, 7.
SURREGATE.

B

BANKRUPT.

See JURISDICTION.

BONA FIDE HOLDER.

See PROMISSORY NOTES, 2, 5, 6, 10, 11.

BONA FIDE PURCHASER.

See PROMISSORY NOTES, 3, 4.

BONDING TOWNS.

1. A county judge has no authority to proceed, under the act of May, 18, 1869, (*Laws of 1869, ch. 907.*) to bond a town in aid of the construction of a railroad, except in proceedings to aid a *valid corporation*. The legal existence of the corporation, as such, is a jurisdictional fact. *The People ex rel. Beardsley v. Van Valkenburgh, 105*
2. The act of 1850, authorizing the formation of railroad corporations, (*Laws of 1850, ch. 140.*) under which articles of association purported to have been filed and a corporation organized, requires that articles of association shall state "the name of each county in this State, through or into which," the railroad "is made, or intended to be made." In the articles of association produced before a county judge, in proceed-

- ings under the act of 1869, this particular was omitted. *Held* that the court could not take judicial notice of distances, and hold, in the absence of the positive statement required by the statute, that this omission was not material. *ib*
3. *Held, also*, that the case did not show that a valid charter was produced before the county judge; and that this point was material to the question of his jurisdiction. *ib*
 4. In proceedings under the act of 1869, to bond a town in aid of the construction of a railroad, the *petition* must direct whether it is in *stock*, or in *bonds*, that the money to be raised shall be invested. *ib*
 5. Where the petition "desired" that a town should create and issue its bonds to the amount of \$75,000, "and to invest the same, or the proceeds thereof, in the stock, or bonds, or both," of a specified railroad company; *Held* that the petition was defective and irregular; was not a compliance with the statute; and did not confer jurisdiction on the county judge. *ib*
 6. In such proceedings the burden of showing that a majority of the taxpayers have signed the petitions is upon the petitioners. There is no presumption to be indulged, that public officers have done their duty; but every step in the proceeding must be proved to be within the powers conferred by the statute. *ib*
 7. The county judge acquires his jurisdiction to make his orders, in these cases, from the statute; and can act only by virtue of the authority so conferred. *ib*
 8. It *seems* that acts of the legislature authorizing municipal corporations to bond themselves in aid of the construction of railroads, are valid and constitutional as an exercise of the taxing power. *Cummins v. The Board of Supervisors of Jefferson County*, 287
 9. The legislature, on the 29th of March, 1869, passed an act authorizing certain towns in Jefferson county to take stock and issue bonds therefor, in aid of a railroad company therein mentioned. The act declared that the bonds, issued in the manner therein directed, should be *valid and binding* upon such towns, in the hands of *bona fide holders or owners thereof*. The commissioners to be appointed under the act, to issue such bonds, were required to report to the board of supervisors of said county, within three days of their regular session, in each year, the amount of money required to pay principal and interest on the bonds issued by them; and the act directed that the said board *should*, thereupon, cause to be *assessed, raised and collected* upon and out of the real and personal property of such town, the sum so reported; and that such amount, when collected, should be paid and applied by the commissioners to the payment of the principal and interest of such bonds. On the 8th of May, 1869, the legislature passed an act to incorporate the city of Watertown, which was to embrace within its limits two of the towns mentioned in the former act; but it was expressly provided that nothing therein contained should be taken or construed to affect the right of the town of W., as it formerly existed, to bond itself under the act of March 29, 1869, or to affect such act. On the 9th of March, 1870, the legislature passed an act "to relieve the towns of W. and P. from embarrassment in the execution of the act of March 29, 1869, arising from the act of May 8, 1869, and to facilitate the construction of" the said railroad. It provided that whenever it should become necessary to levy any tax for the payment of interest and principal upon bonds issued by the towns of W. and P., the board of supervisors should possess the *power*, and it should be their *duty* to levy and collect the same, &c. In accordance with the provisions of this act, proceedings which had been inaugurated under the act of March 29, 1869, were perfected, and bonds issued, and the stock subscribed for by the towns of W. and P. and the bonds passed into the hands of persons holding them for value, and in the faith that they were duly and legally issued. The board of supervisors refused to levy and collect a tax for their payment. *Held*, 1. That in respect to

the validity of the proceedings to bond the towns, so far as they were affected by the constitutionality of the acts, a *certiorari* would have brought up the acts, and therefore it might well be doubted, whether the plaintiffs, instead of asking for an injunction to restrain the board of supervisors from raising the necessary funds, by taxation, to pay the interest on the bonds issued, and for judgment declaring the bonds void, and the act authorizing their issue unconstitutional, had not a perfect remedy at law. 2. That if there were any doubt as to the intent or meaning of the act of March 9, 1870, or as to the extent or limitation of its provisions, it would be in accordance with the well established rules of construction of statutes, to look at the title thereof. 3. That an examination of the provisions of that act left little or no doubt as to the purposes thereof; and that those provisions were as valid as if found in the first act. 4. That the objections that the act of 1870 was invalid and unconstitutional; that there were numerous defects and imperfections in the proceedings; and that a tax-payer had no standing in court authorizing him to maintain an action, having been determined against the plaintiffs, in a former action brought by them against the commissioners, that decision was entitled to respect, and must be followed, upon the principle of *stare decisis*. 5. That legislation of the character of that involved in this action having become very extensive, in this and other states, and having been upheld so often by the courts, it was only a reasonable deference, on the part of the court at special term, to follow the current, until an appellate court should interpose with an adjudication to the contrary. 6. That the statutes did not require, by their terms, a formal acceptance of the provisions thereof. That they provided for consents, defined the number necessary, and the amount of property which should be represented by them. And that in determining these two latter requirements, reference must be had to the acts of March 29, 1869, and to the act of 1870. 7. That a compliance with the statutory requirements being had, the commissioners were

expressly authorized to subscribe for and take stock, and to issue the bonds, which were declared to be obligatory upon the town. 8. That the plaintiffs were not entitled to an injunction restraining the levying of a tax by the board of supervisors, to pay the interest upon the bonds; or to a judgment declaring the bonds void and the statute unconstitutional. *ib*

10. Where the statutes under which a county judge assumed to act, in appointing commissioners to bond a town in aid of a railroad, constituted him a judicial tribunal to hear and determine the questions presented by the petition, and provided that his determination should have the same effect as any judgment of a court of record in the State; *Held* that errors in the determination of the county judge in regard to matters which he had the right to determine and adjudicate upon, could not be corrected by the Supreme Court, in an action brought by taxpayers against the commissioners so appointed and the railroad company, to restrain and prevent the issue of the bonds of the town. *Ayres v. Lawrence*, 454

11. Tax-payers of a town, as such, have no right to an injunction to restrain the issue of town bonds by commissioners appointed for that purpose by a county judge, on the ground that such issue, if allowed to be made, will probably result in increasing the taxation of the town, at some future time; when it is not claimed that the plaintiffs have any interest, except such as is common to all the tax-payers of the town. *ib*

12. It does not alter the principle that the action purports to be commenced in behalf of the plaintiff and all other persons, standing in a like situation, who may desire to avail themselves of it. *ib*

13. Proceedings under the "bonding acts" have always been reviewed on *certiorari*; and all objections affecting the legality of the proceedings, or the jurisdiction of the county judge, are available on such review. Express authority for thus reviewing them is given by the act of 1871.

(*Laws of 1871, ch. 925, § 4.*) *Per*
TALCOTT, J. *ib*

BOOKS OF A CORPORATION.

See EVIDENCE, 2, 3, 4.

BRIDGE.

See NUISANCE, 1.

C

CARRIERS.

1. To authorize a recovery for a negligent loss of goods by a carrier, the plaintiff is not bound to show, affirmatively, how the loss occurred, and that its occurrence was through the defendant's negligence. *Westcott v. Fargo*, 849 *ib*
2. The rule is now well settled that a common carrier may limit his common law liability, in certain particulars, and to a certain extent, by express contract with the owner or shipper of goods. *ib*
3. But carriers cannot limit their liability by a mere notice, even though the notice is brought to the knowledge of the person whose property they carry. It must be by express contract. *ib*
4. In cases where a receipt has been given by a carrier, for the goods, containing a clause limiting and restricting his liability, it has generally, if not uniformly, been held that whether such receipt was to be regarded as a contract, depended upon the question whether the owner of the goods, in taking the receipt, knew its contents, or was to be presumed to know them. *ib*
5. If he knew, or was presumed to have known, from the nature of the transaction, the law infers his assent, and makes it the contract between the parties. Otherwise there is no meeting of minds, and no express contract. *ib*
6. Where owners of goods, themselves, furnished the blank receipt which the carriers' agents signed, it having been taken from a book containing blank printed receipts which they had previously obtained from the carriers; *it was held* that such owners must be presumed to have known the contents of the receipt, and to have assented to it. *ib*
7. And the blank, left in the receipt, for the value of the goods, not being filled, and the referee finding that neither the carriers nor their agent who received and receipted the package had any knowledge that its value exceeded \$50, or any notice or reason so to believe; although the receipt contained a provision that unless the value of the package was specified therein, the carriers should not be liable to an amount exceeding \$50; it was *further held* that the referee correctly decided that the package was received to be carried according to the terms of the receipt, and upon the contract of which the receipt was the evidence. And that the defendants were not therefore liable, in any event, beyond the sum of \$50, if the loss fell within the contract, and was covered by it. *ib*
8. Where a loss, occasioned by the carelessness or negligence of a carrier or his agents or servants, is not mentioned, in terms, in the contract, the law will not presume that a loss so occasioned was intended by the parties. *ib*
9. The contract is to be construed most strictly against the carrier, where it rests in a receipt signed by him only; and when it stipulates for a restricted liability in case of loss, it will not be construed to embrace a loss arising from the careless and negligent acts of the carrier or his servants, unless a loss from such cause is provided for, in express and unequivocal terms, in the contract. *ib*
10. And the rule of construction is the same where, by the terms of the contract, the carrier is only to be held liable as a forwarder. The exemption, in such cases, only applies to losses for which the carrier would be liable as insurer, in his capacity of common carrier. *ib*

11. A carrier may, by express contract, exempt himself from liability for a loss arising even from the carelessness and negligence of his servants or agents. But in all such cases, where the exemption for loss from such cause is expressly provided for, in the agreement, it has been uniformly held that such contract had no application to losses occasioned by the fraud or gross negligence of the carrier or his servants and agents; and that the stipulation for exemption only applied to losses arising from want of ordinary care. Where there is no such stipulation in the contract, it must be held that the contract does not relate to losses arising from the negligence of the carrier or his agents. *ib*

12. The same rule is applicable to a stipulation that any claim for loss shall be presented within thirty days from the accruing of the cause of action. The presentation of the claim within the time, and in the manner, specified, is not a condition precedent to the right of action. *ib*

See DAMAGES, 9.

CASES COMMENTED ON, DISTINGUISHED OR DISAPPROVED.

1. The cases of *The Farmers' Loan and Trust Co. v. Maltby*, (8 Paigs, 861,) and *Doyle v. The Peerless Petroleum Co.*, (44 Barb. 239,) commented on, and distinguished from the present. *Toft v. Munson*, 81

2. The statement in *Lyon v. Chase*, (51 Barb. 14,) that a release of rent need not be by deed, but that there may be a presumption of payment, arising from lapse of time, disapproved. *Lyon v. Addo*, 89

3. That case, standing alone, as authority to the point that "there would seem to be no distinction between the covenants in this instrument and other sealed instruments," should not be followed; especially in cases where the grantees of the estate have accepted their conveyances "*subject to the rents in the original conveyance*;" which amounts to an implied covenant to pay, added to

the proof, or admission, that such rent had not been paid. *ib*

4. The case of *The Atlantic Dock Company v. Libby*, (45 N. Y. 499,) commented on and distinguished. *Durke v. Candel*, 552

CERTIFICATE.

See COMMON SCHOOLS.

COMMERCIAL PAPER.

See PROMISSORY NOTES, 2, 3, 4.

COMPARISON OF HANDS.

See EVIDENCE, 6.

COMPLAINT.

Where a complaint does not allege that an execution, issued upon a judgment, was directed to the sheriff of the county where the judgment debtor then resided, the complaint is not aided by an averment that such execution was returned *nulla bona*. *Payne v. Sheldon*, 169

See JUSTICES' COURTS, 1, 2.

COMMON SCHOOLS.

1. A certificate from the proper school commissioner, of qualification to teach, is not *conclusive* evidence of qualification, when that question arises between trustees and teacher. It is *prima facie* evidence, only; and the presumption raised by it may be rebutted by direct evidence tending to show that the holder lacks all or any of the requisite qualifications. *Gillis v. Space*, 177

2. The trustee of a school district has no power to contract for the services of an unlicensed teacher, and bind the district. But if he should make it a condition of hiring that the teacher should procure a certificate before entering upon the duties of teaching, such contract would be valid; for then the services of a licensed teacher would be bargained for. *Per BARKER, J.* *ib*

CONSIDERATION.

See EVIDENCE, 8.

PROMISSORY NOTES, 3, 4, 5, 9, 10.

CONSTABLE.

A constable has such an interest in property upon which he has levied by virtue of executions, as will enable him to maintain an action to recover the possession thereof, from one who has purchased the same of the defendant in the executions, after levy. *Rus v. Perry*, 40

See JUSTICE OF THE PEACE, 8.
OFFICER.

CONSTITUTIONAL LAW.

1. The courts of this State have repeatedly held that land taken, in a city, for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use; and there appears to be no reason for doubt on the subject. *Per LEONARD, J. Matter of the Commissioners of the Central Park*, 282
2. The constitution of this State having authorized property to be taken for public use, and the compensation therefor to be ascertained by a jury, or by not less than three commissioners appointed by a court of record, when these conditions have been observed, it is not the province of this court to determine, in opposition to the authority granted by the legislature, to the commissioners of the Central Park, as to the necessity for laying out new parks or squares. 40
8. The citizen is entitled to the absolute control of his estate, unless it is taken for public use, in due form of law; and this right it is the duty of the court to maintain. 40
4. His land can be so taken only by "due process of law." But when the conditions required by the constitution of the State to be observed, for the protection of the rights of the citizen, have been complied with, it must be regarded as a fulfillment of the direction in respect to "due

process of law;" whether the direction be found in the State constitution, or in the fifteenth amendment to that of the United States. 40

5. The protection of that amendment can be invoked only when the right of the citizen has been invaded by a disregard of the "due process of law," as guarantied by the fundamental law of the State. 40
6. Chapter 852 of the laws of 1829, and chapter 80 of the laws of 1853, are constitutional and valid. *The People ex rel. Furman v. Clute*, 356
7. The Rochester and Bloomfield Natural Gas Light Company was incorporated under the general gas companies' statute of 1848, for the purpose of utilizing the natural gas flowing from a gas spring or well in the town of Bloomfield, county of Ontario. By a special act of the legislature, passed May 9, 1870, it was authorized to conduct the gas from said well to any city, town or village within thirty miles of that point, by mains, to sell and supply gas for lighting the streets, public parks, dwellings and other buildings therein. It was further authorized to take private property for any of its purposes, and in a proceeding to acquire such private property it was directed to follow the provisions of the general railroad act. The statute declares that any real estate so acquired, for the purposes aforesaid, shall be deemed to be acquired for a public use. The corporation undertook to conduct gas to the city of Rochester, a distance of about thirty miles from its well. In a proceeding to acquire the right of way for its mains through the lands of private owners, and to appoint commissioners of appraisal, it was held, that the purposes, objects and business of this corporation were a "public use," within the meaning of the constitution; and that the statute authorizing it to take private property for the purposes of its said business was constitutional and valid. *Matter of the Bloomfield and Rochester Natural Gas Light Co. v. Richardson*, 487
8. In order to constitute a "public use," within the meaning of the constitution, it is not necessary that

the improvement should directly benefit the people of the whole State, but the direct public benefit contemplated may be confined to a particular community. *ib*

9. When the use to which private property is to be appropriated is a public one, the legislature is the sole judge of the necessity or expediency of the appropriation. *ib*

10. In general, the legislature is the sole judge of what constitutes a public use. But to a very limited extent, the constitutionality of a statute purporting to confer the right to take private property for public use, is a judicial question. If the effect of a statute is to divest one citizen of his property for the benefit of another, without the semblance of any public benefit, or when the absence of all pretense of public benefit is clear and palpable, it will be the duty of the courts to declare the act unconstitutional and void, not as an unauthorized taking of private property for public use, but as an attempt to take it for private use. But in order to authorize the court to interfere, it must be clear and manifest that no public use was contemplated. *ib*

11. The provision of the constitution in question does not purport, and was not designed, to defuse or limit the nature of the use for which private property can be taken, but only to require, absolutely, that in all cases where the property is taken for a public use, just compensation shall be provided for and made. *ib*

12. *It seems* that if any business or enterprise can fairly be supposed to be a matter by which the public of a particular community, or various communities, may be benefited, or if it has for its object, or one of its objects, a matter which may be for the public benefit, or which may constitute a public improvement, then such business or enterprise is a "public use," within the meaning of the constitution, although the parties engaged in it may be actuated solely by the inducement of private gain. *ib*

18. The act of the legislature, of April 19, 1871, (*Laws of 1871, ch. 588*),

which provides that "no liability for any purpose whatever shall be hereafter incurred by any department of the city of New York, or officers of the county of New York, exceeding in amount the appropriations made for that purpose," is not unconstitutional. The act is prospective, and its provisions are not to have a retroactive effect. Whatever valid contracts or liabilities of the city existed at the date of its passage, continue to exist, and are not abrogated by the act. *Quinn v. Mayor &c. of New York*, 596

See BONDING TOWNS.

CONVERSION.

See SHERIFF, 4.

CORPORATIONS.

1. Although courts, in some cases, have held corporations to be *persons, inhabitants and residents*, yet this has been by construction, and for special purposes; such as to create an equality of liability to taxation, and to confer power to bring or institute actions, the same as citizens. And, for general purposes, and for other special purposes, they are held not to be residents. *Per POTTER, J. The People v. Schoonmaker*, 44

2. And, independent of the cases making them "inhabitants," and "residents," by construction, for certain purposes, the natural, ordinary and literal construction of the words "residents of a town," would not include corporations; especially those whose places of business were elsewhere. *ib*

3. The word "resident," occurring in the constitution, or in a statute, ordinarily means an individual—a citizen—and does not mean a corporation. *ib*

4. Upon the death of a stockholder in a corporation, intestate, and the appointment of administrators of his estate, and their acceptance of the trust, such administrators become, by operation of law, vested with the legal title to the stock, and conse-

quently stockholders of the company, representing the estate of their intestate. *Matter of the North Shore Staten Island Ferry Co.* 558

5. As such, they have all the rights appertaining to the ownership of the stock, one of which is, the right of voting at elections of directors of the company. *ib*

6. No formal transfer, on the books, is necessary to give this right. *ib*

7. The fact that the decedent held the stock subject to a trust or duty in favor of others does not affect the question. The right to vote follows the legal ownership, and the corporation has nothing to do with the equities between the owner and third persons. *ib*

8. Upon the death of a trustee of personal property, the trust devolves upon his representative. And as to everybody except the *cestui que trust*, such representative is absolute owner. *ib*

9. As trustee, however, he owes the duty of active management, for the protection and preservation of the trust estate. And where that consists of stock in a corporation, the duty of voting at elections of directors thereof is too plain for argument. *ib*

See EMINENT DOMAIN.
EVIDENCE, 2, 8, 4, 5.

COSTS.

1. The Supreme Court possesses no power to award costs in an action pending, at the time, in a county court. Nor has a county court, or county clerk, the power to order costs accruing in the Supreme Court to be added to a judgment rendered by the county court. *Humiston v. Ballard*, 9

2. A county court, without legal authority, ordered a case, pending in it, and which had never been legally removed from it, to be heard at a general term of the Supreme Court. When it came there, the court said it was improperly there and refused to hear it, and entered no judgment for costs, or otherwise, but entered

a mere order dismissing it from the Supreme Court. *Held* that upon a final recovery, by the plaintiff, he was not entitled to the costs in the Supreme Court at the general term, when the case was sent there by the order of the county court. *ib*

3. In an action to which the people are a party, costs are not in the discretion of the court. *The People ex rel. Furman v. Clute*, 356

4. In an action brought for the purpose of having certain deeds of lands worth \$30,000, declared to be mortgages, and that the defendant held the title as trustee, the referee found against the plaintiff, and reported that the deeds were absolute and vested the fee in the defendant, free of any trust or condition. On a motion by the defendant for an additional allowance: *Held*, 1. That the case came within the provisions of section 809 of the Code, as it now stands amended. 2. That the basis of estimate was the value of the property directly affected by the judgment; that being the "subject matter involved." *Burke v. Candee*, 552

5. An additional allowance is made by way of an indemnity to the party succeeding in the litigation. *ib*

6. The court must fix the amount to be allowed. Subject to the limitation in the statute, that the maximum shall not exceed five per cent "on the amount of the recovery or claim or subject matter involved," the sum will depend upon the proper deductions from the proofs submitted as to the indemnity needed for actual expenses in the action, necessarily or reasonably incurred beyond the taxable costs allowed by statute to the prevailing party. *ib*

7. Where the value of the property sought to be affected by the judgment was \$30,000, and the law of trusts and trustees was involved in and considered in connection with the evidence, at the hearing and upon the argument of the cause; the trial before the referee continued thirty days; a large number of witnesses were examined, and numerous pieces of documentary evidence and private writings were produced

and examined; and besides the time so occupied before the referee, the counsel spent about the same number of days in preparing the cause for trial; and the fees of the referee were \$875; *Held* that this was a case both "extraordinary" and "difficult" in its features, within the section of the Code permitting a further allowance to be made to the prevailing party. *ib*

See APPEAL, 2, 8.
JUDGMENT, 1.

COUNTER CLAIM.

1. In an action by the owners of a stove-mill, to recover, upon a contract, for cutting a quantity of staves, at their mill, for the defendant, at a certain price per thousand, a claim of the defendant against the plaintiffs, for converting to their own use a large quantity of the staves, cull staves and corner pieces, made from the stove bolts of the defendant, which were drawn to the plaintiffs' mill to be cut into staves, arises out of the plaintiffs' claim, and is connected with the subject of the action. Hence it is admissible as a counter claim, under the Code, (§ 160.) *Wadley v. Davis*, 500
2. A counter claim, as now used and understood, includes recoupment and set-off. *Wilder v. Boynton*, 547
3. In an action for money paid, and for manufacturing ninety-six fire extinguishers for the defendant, at his request, amounting to \$1200, a balance of \$1076 being claimed as due, the answer, after setting up a general denial, alleged that in consideration of an agreement by the defendant that he would allow the plaintiffs the privilege of making and vending 100 fire extinguishers, of which the defendant was the patentee, the plaintiffs undertook and agreed to manufacture and sell the same, within a reasonable time, and from the proceeds to allow and pay the defendant one-third of the net proceeds of such sales; and that they wholly failed to keep their agreement; whereby the defendant sustained \$2500 damages. *Held* that the answer contained all the facts essential to a well stated counter

claim, and necessary to sustain it as such. *ib*

See DISCONTINUANCE.

COUNTY COURT.

See COSTS, 1, 2.

COUNTY JUDGE.

See BONDING TOWNS, 1, 2, 3, 5.

COVENANT.

See EVIDENCE, 8.

CRIMINAL LAW.

1. Upon a writ of error to review a conviction for murder, had in a court of oyer and terminer, it is not sufficient that the records of the court below show a conviction and sentence. It must be made expressly to appear, by a distinct statement in the record sent up as a part of the return, that the prisoner was asked, after his conviction, what he had to say why judgment should not be pronounced against him. The omission of such a statement is fatal to the judgment. *Graham v. The People*, 468
2. Where a court of oyer and terminer, in its return to a writ of *certiorari*, adhered to the return made by it to a writ of error, as containing the only authentic record of its judgment, in the premises, and declined in any way to alter and amend its minutes without the direction, order or permission of this court, (although they were erroneous,) for the reason that "the record of judgment" was before this court by the return to the writ of error; *Held* that in taking this position the court of oyer and terminer had mistaken the law and practice; inasmuch as, in modern times, the *very record* itself is not sent up, on a writ of error, but only a transcript, and for the purposes of an *amendment*, the record remains in the court below. *ib*
3. The motion to amend a record of a court of oyer and terminer, after a

- return has been made to a writ of error, should not be made in the Supreme Court. If improper matter has been interpolated in the minutes constituting a part of the return, without the authority of the court of oyer and terminer, and which is no part of its record, that court should direct such matter to be expunged from its minutes. *ib*
4. Where the returns made to a writ of error, and to a *certiorari*, differed in an essential particular, viz., as to the fact whether the prisoner was asked if he had anything to say why sentence should not be pronounced; the former omitting to show that the prisoner was given an opportunity to show any cause, and the latter stating that he was asked that question, and in response thereto made some remarks; it was *held* that the return to the writ of error, being signed by the presiding judge of the oyer and terminer, and by the district attorney, and bearing upon its face the evidence that it had been inspected by the court, while the return to the *certiorari* was not so signed, the return to the writ of error was to be regarded as containing the authentic judgment of the court below, and upon which this court was to proceed and render judgment. *ib*
 5. Where the return shows that a part of the minutes, embraced therein, is not the record of the court below, but is in legal effect a forgery, and should have been expunged, by the court below from its minutes, the effect of the return, taken altogether, must be to produce the same result, in this court, as though the interpolated matter had been expunged. *ib*
 6. Upon the reversal of a judgment of a court of oyer and terminer, on the ground that it does not appear, from the return to the writ of error, that the prisoner was asked if he had anything to say why sentence should not be pronounced, the case is not to be remitted to the court below for sentence, nor is the prisoner to be absolutely discharged; but this court will proceed to examine the errors alleged to have been committed on the trial, and if it is of opinion that the court of oyer and terminer erred in admitting improper testimony against the prisoner, will grant a new trial. *ib*
 7. On a trial for murder, an attorney employed by the prisoner on the day of the alleged murder, to draw for him certain papers, viz., a lease and receipt, cannot be compelled to testify to the drawing of such papers by him, or to the contents thereof; nor as to the state of either of the papers, when delivered to the prisoner; where such papers are not in any manner necessarily connected with the perpetration of any crime, and they cannot, of themselves, in any way aid in the commission of any fraud or crime. *ib*
 8. The same rules must govern the examination of a prisoner on trial, when he avails himself of his privilege to become a witness, as apply to any other witness. *Mars v. The People*, 618
 9. One of these rules is, that a party cannot, upon cross-examination of a witness for the adverse party, draw out collateral statements, not material to the issue on trial, and then contradict such statements. He is concluded by the answer of the witness. *ib*
 10. Upon the trial of a prisoner, upon an indictment, he became a witness in his own behalf. On his cross-examination by the district attorney, he testified that he had not been convicted of burglary, before the alleged offence was committed. This question was then put to him: "I ask you again, specifically, were you not, on April 25, 1856, arraigned at the bar of this court, charged with the crime of burglary; did you not confess your guilt, and were you not sentenced to three years in the State prison, for that offence?" The prisoner answered, "I was not. No, sir." The district attorney offered to prove, by the records of the court, that a person by the name of the prisoner was convicted of felony. The court, although it decided that this was immaterial proof, unless it was connected, in some way, with the prisoner, admitted the evidence. The district attorney then stated the contents of a record which showed a conviction of a person of the same name as the prisoner, on the 25th

- of April, 1856, of burglary in the third degree. Subsequently the court rejected evidence to show that the prisoner was the person named in the record of conviction. *Held*, that the above rule of evidence was violated, on the trial. That the record of conviction was inadmissible, even in connection with the testimony *alibi*, that the prisoner was the person named in it; and it should have been rejected altogether. *ib*
11. *Held, also*, that it was impossible to say that the prisoner was not prejudiced by this evidence, or that the rejection of the evidence offered, to show the identity of the person named in the record, cured the error. That the record being in, the jury, in the absence of testimony on the subject, had a right to draw the inference of identity of person from the identity of name. And that the judge should have withdrawn the matter from the consideration of the jury, and have told them, distinctly, to disregard it. *ib*
12. Under the act of the legislature of May 7, 1869, which provides that a party accused of crime shall, at his own request and not otherwise, be deemed a competent witness in his own behalf, a prisoner, on his trial, was put upon the stand as a witness in his own behalf, and examined by his own counsel, and cross-examined by the district attorney. On his cross-examination, being asked if he had been in the State prison, he said he had, and served out his term. The court instructed the jury to wholly disregard the testimony of the prisoner. *Held* that this was an error. *Newman v. The People*, 680
13. *Held, also*, that it was an error in the court, if the testimony could have been excluded, to admit the testimony and then direct the jury to disregard it. *ib*
14. The law intended to allow a prisoner the benefit and privilege of stating to the jury any matter calculated to explain the charge against him. This privilege is to be enjoyed irrespective of any matter which could disqualify a witness under ordinary circumstances. *ib*
15. The degree of credit to which a prisoner, examined as a witness in his own behalf, is entitled, is decided by the jury, and not the court. *ib*
16. When a prisoner, on his trial, is examined as a witness in his own behalf, under the act of the legislature, of 1869, it is not competent to impeach him as a witness, nor any other witness, by contradicting him as to facts disconnected with, or collateral to, the subject matter at issue and on trial. *Rossmore v. The People*, 684
17. The plaintiff in error, on his trial, for procuring an abortion upon B., after being examined as a witness in his own behalf, testified, on his cross-examination, that he did not know W., a young woman in court then pointed out to him; that he had never seen her; and that he had never procured an abortion upon her. W. was then sworn, and testified, (against an objection and exception,) that the prisoner had produced an abortion upon her person, about two years before. *Held* that upon well established authority the admission of this testimony of W. was an error. *ib*
18. *Held, also*, that the illegal evidence so admitted tended to damage the prisoner's case by inducing a conviction in the mind of the jury, from the commission of the previous offence, that he had committed the crime for which he was then on trial. *ib*
19. No person can be required to come into court, on a trial upon an indictment for a specific offence, prepared to defend or explain other transactions, not connected with the one on trial. *ib*
20. The admission of illegal evidence cannot be disregarded, or excused upon the ground that the other evidence in the case was sufficient to justify a conviction. The conviction must be had by legal evidence, only. *ib*

CUSTOM.

1. Customs must be reasonable, and not contrary to the general principles of law. *Wadley v. Davis*, 500

2. A usage of a particular trade may sometimes be proved with the view of raising the presumption that the parties contracted with knowledge of, and reference to it, so that it entered into and became a part of the contract. *ib*
3. In such a case, it must be shown that the party against whom the usage is set up had notice of it, at the time of making the contract, or it must be shown to have been so long continued, universal and notorious that all persons may be presumed to have had notice of it. *ib*
4. A custom to the effect that a person employed to cut staves from another's bolts has a right to take, and appropriate to his own use not only the clippings and corner pieces but the culls, without the consent or agreement of the owner, cannot be sustained. *ib*
5. Such a custom is not only not in harmony with law, but is manifestly against public policy. *ib*
6. To allow a mechanic or artisan, who works up the materials of another, to keep so much of such materials as is not used for the benefit of the owner of the materials is to array his interests in direct opposition to those of his employer. *Per TALCOTT, J.* *ib*

D

DAMAGES.

1. In January, 1845, the defendant wrongfully converted to his own use a mare belonging to the plaintiff, for which the latter then had a right of action, to recover from the defendant the value of the mare. In February, 1845, the defendant sold the mare to McK. In an action of trover, for the mare, the defendant offered to prove, in mitigation of damages, that soon after McK's purchase of the mare, the plaintiff claiming her as his property, took her out of the possession of McK. without his consent, and converted her to his own use. This evidence, though objected to, was received. The court charged the jury that the

taking back of the property by the plaintiff must go in mitigation of the damages; and that it was a case for nominal damages, only. *Held, 1.* That the court erred in admitting the evidence offered in mitigation of damages. 2. That whether that were so, or not, there was error in charging the jury that it was a case for nominal damages; for if the plaintiff was not entitled to recover the full value of the mare, he was at least entitled to recover the actual damages he had sustained by being deprived of the use of her, and the expenses he had incurred in regaining his property. *Sprague v. McKinzie,* 60

2. The plaintiff offered to show that McK., the defendant's vendee, had sued him for his taking the mare by force, and recovered a judgment. *Held* that such evidence was erroneously excluded, as it would have overthrown every pretense of a defense, by the defendant. *ib*
3. The object of the law being to fairly compensate a party injured through the negligence of another, for the entire loss directly caused by the injury, the pecuniary consequences resulting from such party's inability to give his business his attention forms a proper item of the remuneration to be made. *Walker v. The Erie Railway Co.,* 260
4. Where a train of cars upon the defendant's railway, in which the plaintiff was a passenger, was met by a construction train coming from the opposite direction, which had upon it a bar of iron projecting five or six feet, in a slanting direction, so that it would necessarily run into anything it came against, and such bar struck the car in which the plaintiff was sitting, and injured him; *Held* that in the absence of everything tending to explain or show how the iron bar was placed in the position that produced the injury, the inference was plain that the injury resulted from the inattention and negligence of the persons having the control and management of the construction train. *ib*
5. *Held, also,* that such inattention and negligence was a violation of the obligation existing between the de-

defendant as a carrier, and the plaintiff as a passenger, which, by its contract, the defendant had assumed to perform; viz. to observe the highest degree of skill, care and attention in his carriage and transportation. And that was sufficient to entitle the plaintiff to recover damages for the injury sustained. *ib*

6. In actions to recover damages for personal injuries occasioned by negligence, no precise rule exists by which the extent of the recovery can be prescribed. For the compensation to be received is, to a great extent, to be awarded for pain and suffering which cannot be accurately measured by amounts. *ib*

7. The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied where the injury is to the person; injuries of that character being without precise pecuniary measure. *ib*

8. The law has accordingly, in that class of cases, committed the determination of the amount of damages to be awarded, to the experience and good sense of jurors. And when the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment on their part, the policy of the courts is, and necessarily must be, not to interfere with their conclusion. *ib*

9. Where injuries sustained by the plaintiff through the negligence of the defendant—a carrier of passengers—were of an exceedingly painful, serious and permanent nature, some of the important effects of which would probably continue during his natural life, and might sensibly abridge the period to which it might otherwise have been extended; and the plaintiff was in his early manhood, and engaged in an extensive and lucrative business, which was impaired by his inability to give it the requisite attention, since his injury, and he was afflicted with bodily derangements that might measurably unfit him for the duties of his profession; *Held* that under these circumstances, the court had no data from which it could say

that a verdict for the plaintiff for \$20,000, was greater than the compensation he should justly receive. *ib*

See AGREEMENT, 8, 9.

GUARDIAN AND WARD, 7.

DEBTOR AND CREDITOR.

1. Where the property of a judgment debtor, sought to be reached and applied upon the judgment, is real estate, only, and the debtor has no other property out of which the judgment can be satisfied, and that has been conveyed to another, in fraud of the judgment, it is not essential to relief for the judgment creditor to show that execution has been issued upon his judgment. *Payne v. Sheldon*, 169

2. Thus, where it was alleged in the complaint, and admitted by the demurrer, that a just debt was due from a defendant; that after the same was created, and before judgment thereon, he sold and conveyed the premises sought to be reached to one of his co-defendants, with the fraudulent intent and design of cheating and delaying the judgment creditor in the collection of his debt; that he was without pecuniary responsibility, and owned no other property out of which the judgment, or any part thereof, could be collected; *Held* that a court of equity had power to grant the appropriate relief to the plaintiff by declaring the fraudulent conveyance void, and setting it aside, and decreeing that the judgment debtor was the owner of the premises conveyed by it, and that the same were subject to the lien of the judgment. *ib*

3. And that it was no objection to the granting of such relief, that the plaintiff did not allege, in his complaint, that an execution had been issued upon the judgment, and placed in the hands of the sheriff. *ib*

See EQUITY.

DEED.

1. An instrument in writing, under hand and seal, but without a subscribing witness or acknowledgment,

as required by the Revised Statutes, is insufficient to convey real estate, and void as against a purchaser or incumbrancer. *Roggen v. Avery*, 65

2. One of several heirs bought out the interests of his co-heirs in the lands descended, taking a separate deed from each, in the same form. The widow of the ancestor having a right of dower in the land, and then occupying, without admeasurement, a certain thirty acres which was called her dower, the heirs in deeding to the purchaser, for the purpose of reserving to the widow her said dower, each made a reservation of such dower in these words: "The party of the first part reserves out of the above described land one-fourth of 80 acres of said land that was set off to" the widow "as her right of dower or power of thirds." *Held* that the reservation was of the dower right, and that the grantee took the whole premises, subject to the right of dower, and not merely two thirds. *Clark v. Cottrell*, 835

See EQUITY, 5.
EVIDENCE, 8.
MORTGAGE, 1.

DECEDENT'S ESTATES.

See SURREGATE.

DEMURRER.

See JUSTICES' COURTS, 2.

DEVISE.

1. Neither by the common law, nor under our statutes regulating devises, can a devise of lands to the United States be held valid. *Matter of the probate of the will of Fox*, 157
2. That government is neither a person capable of taking by devise, nor can the statute regulating devises be construed as extending this right to bodies politic or corporate, except when authorized by the laws of the State to take by devise. *ib*
3. By the common law, a devise of real estate was not permitted, except for a particular use. The right to devise real estate rests in the stat-

ute. The statute of New York only allows devises to be made to persons capable of holding, and to corporations authorized by their charter to take by devise. The United States, not being within either of these descriptions, cannot take, under our statute. *ib*

DISCONTINUANCE.

1. The right of a plaintiff to *discontinue* after an answer containing a counter claim, and a partial trial, is a qualified one. The court has a right to control its own orders, and may exercise its discretion in respect to the terms upon which parties shall be permitted to discontinue actions. *Wilder v. Boynton*, 547
2. The plaintiffs (who were non-residents) after voluntarily coming into court and submitting themselves to its jurisdiction, entered upon a trial; and when the defendant produced evidence which not only established that they had no cause of action, or at most, one upon which they were entitled to recover of the defendant a less sum than he was likely to recover of them, they asked for an interview, to negotiate a settlement, and for that purpose the referee suspended the trial. Failing in the negotiations for a settlement, they left the place where the trial was being had, and escaped from the State before the defendant was able to serve them with a summons to commence a second action. *Held* that the plaintiffs having, after occupying the time of the court, deliberately sought to avoid its jurisdiction, they could not, by an *ex parte* order, entered without the leave of the court, discontinue the action; and the same was set aside, on motion. *ib*

DOWER.

See DRED.

E

EJECTMENT.

In an action under the Code, to recover the possession of real estate.

the plaintiff must (as in the former action of ejectment) recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. *Richardson v. Pulver*, 67

ELECTION AND ELECTORS.

1. Where an elector votes for an ineligible candidate, with knowledge of his ineligibility, his vote is void. And it makes no difference that all the electors did not have knowledge. *The People ex rel. Furman v. Clute*, 356

2. Under such circumstances, the eligible candidate having the greatest number of votes is elected; provided that number is greater than the number of votes cast for the ineligible candidate by electors who did not possess such knowledge. *ib*

3. Such knowledge may be presumed. And where the ineligibility of the candidate arises from his holding a public office, the electors within the territorial limits of such office will be charged with knowledge of such ineligibility. *ib*

4. Since the decision of *The People v. Saxton*, (22 Wend. 309,) and *The People v. Cook*, (8 N. Y. 68,) it has been considered settled that on the trial of a *quo warranto*, where the question as to who was elected to a particular office and what was the intention of certain ballots, is investigated before a jury, the court and jury are not confined to the narrow limits which control the boards of canvassers, who have no power to take evidence *alimunde* the ballot itself, for the purpose of elucidating any apparent ambiguity on its face, or any apparent incongruity between it and the surrounding circumstances. *Per TALCOTT, J. The People ex rel. Gregory v. Love*, 535

5. The placing, upon a ballot, of a "paster" containing one name, over another name, indicates an intention to substitute one name for another. If it be placed over another name which is under the title of an office, it indicates an intention to substitute for that office the name upon the paster. If it be done in such a manner as to afford any ground for

doubt whether the voter intended to designate two persons for the same office, that doubt may be safely left to be solved by a jury, in view of all the facts, the appearance of the ballot, and the surrounding circumstances. *ib*

6. At an election for town officers, printed ballots were used, headed, "For supervisor, Ozro Love." Next below, was, "For town clerk, John A. Raymond." Upon the canvass of the votes, twenty-six ballots were found, having upon each of them a "paster," or slip of paper, with the name of the relator printed thereon, pasted under the heading "For supervisor," so as to cover the name of Ozro Love. And some of them wholly covered, and others partly covered, the words "For town clerk," next below the name of Ozro Love; so that, in cases where the whole of the words "For town clerk" were covered by the "paster," the ballot, with such paster, purported to be, "For supervisor, Ozro Love. John A. Raymond." The board of canvassers refused to allow either the relator or Love any of the ballots on which the relator's name was pasted, and where the paster covered the whole or any part of the words, "For town clerk," on the ground that they designated the names of two persons, viz., the relator and John A. Raymond, for the office of supervisor; and their decision was sustained by the judge at the circuit. *Held*, 1. That the judge, at the circuit, erred in holding, as matter of law, that the rejected ballots could not be allowed to the relator. 2. That the facts should have been submitted to the jury, for them to determine whether the ballots in question designated two names for the same office, or were only intended to substitute the name of the relator for that of the defendant, for the office of supervisor. *ib*

See CORPORATIONS, 5 to 10.

EMINENT DOMAIN.

The power to exercise the right of eminent domain, where such right exists, may be conferred upon a corporation acting in its own interests,

and for purposes of private gain.
*Matter of the Bloomfield and Rochester
 Natural Gas Light Co. v. Richardson,*
 487

EQUITABLE CONVERSION.

1. To constitute an equitable conversion of real into personal estate, it must be made the duty of, and obligatory upon, the trustees, to sell in any event. A mere discretionary power of selling produces no such result. *Matter of the probate of the will of Fox,* 157
2. The doctrine of equitable conversion is based upon the principle that equity will require a thing to be done that ought to be done; but when it is apparent that the thing sought to be obtained was contrary to law, there is no ground upon which the doctrine can be made applicable. *ib*

EQUITY.

1. Courts of equity acquire jurisdiction to aid legal remedies, when it appears that without such assistance the legal process is ineffectual, and that with such assistance beneficial relief can be rendered. *Payne v. Sheldon,* 169
2. If the property sought to be reached by a judgment creditor is liable to sale on execution, then it must be made to appear that it has been made subject to the lien of the judgment, and that there is some necessity for asking the aid of a court of equity. *ib*
3. So far as real estate is concerned, the lien is effected by docketing the judgment in the county where the lands are situated; and as to goods and chattels, by issuing execution to the sheriff of the county where the property is situated, and levying on the same. The lien being thus placed upon the property, the creditor is in a situation to ask relief in a court of equity, if there be an existing necessity. *ib*
4. The lien of a judgment on the land of the judgment debtor, and the right to sell it on execution in payment of the judgment, is the basis

of the right to have a fraudulent sale or incumbrance removed. And the fact that the debtor has no other property proves, conclusively, that there is a necessity for relief. The issuing of an execution, in such a case, does not change the situation, in the least, or benefit either party. And a return of *nulla bona* is only evidence of the necessity of securing aid from a court having equity powers. *ib*

5. A court of equity, when its jurisdiction is invoked to set aside deeds and contracts of a person upon the ground of insanity, acts upon equitable principles. It is by no means a matter of course for a court of equity to set aside and declare void the act of a lunatic executed during his lunacy. It does so in no case, except upon equitable terms—upon the universal maxim of that court, that he who seeks equity must do equity. *Cansfield v. Fairbanks,* 461

See AGREEMENT, 8.
DEBTOR AND CREDITOR, 2, 8.
JUDGMENT, 2.

ESTOPPEL.

See MORTGAGE, 1.
RENT, 2.
SUPERIOR EQUITY.

EVIDENCE.

1. After judgment, it will be assumed that evidence sufficient to sustain it was given. *Dutcher v. Porter,* 15
2. The books of a corporation, proved to have been kept by its treasurer, in the business of the company, and to be in his handwriting, accompanied by proof of his death, are admissible in evidence, under the rule that entries made in the usual course of business, by one who had no interest to falsify, should be received in evidence, after his death. *Chenango Bridge Company v. Lewis,* 111
3. The books of a bridge company proved by its treasurer to have been kept by him, and to contain correct entries of tolls, as given to him by the toll-gatherer, coupled with proof

- by the toll-gatherer that he had made correct reports of the toll received by him, are admissible as evidence, because proved by the treasurer who kept them. *ib*
4. But books of the company, proved by its treasurer to have been received by him as the company's books, upon his accession to office, and containing an account of the tolls received for a period of several years previous to that time, are not admissible as evidence to prove the amount of tolls received during that period, without the necessary and proper preliminary proof as to such tolls. *ib*
5. It is not sufficient to show that such books are *said to be*, or that they *purport to be*, the books of the corporation. To make their contents evidence, it is not enough, to prove that they appear to be the books of the corporation; nor is it enough, to prove that they were in the handwriting of the former treasurer, or toll-gatherer. *ib*
6. In an action brought upon an instrument in writing, where the signature of a subscribing witness to the instrument is alleged to be a forgery, the defendant cannot read in evidence the *assignment* of a lease put in evidence by the plaintiff, and purporting to be witnessed by the same person, (since deceased,) for the mere purpose of getting a signature for comparison with that alleged to be a forgery. *Goodyear v. Voeburgh*, 154
7. Where the question is upon the genuineness or the forgery of the signature of an individual as a subscribing witness to an instrument, an expert may be allowed to show the dissimilarity between such signature, and the signature of the same person as a subscribing witness to another instrument, by testifying that the one is a natural, and the other an unnatural hand; that there is a difference in the color of the ink, and the writing and slant of the letters; and that if one is genuine he should reject the other; provided such expert has been acquainted with the handwriting claimed to be a forgery, or the other instrument is *properly in evidence for other purposes*. *ib*
8. While in deeds, and other instruments, a party may, for certain purposes, prove the consideration to have been different from that expressed, such evidence is not admissible to contradict an *agreement or covenant* to pay a certain sum. *Delamater v. Bush*, 168
9. The principle that previous oral negotiations are merged in the writing, is also a reason why such proof should not be admitted; in the absence of fraud or mistake. *ib*
10. Where, in an action upon a written agreement, the oral evidence disclosed that the parties to the action, between themselves, fixed \$450 as the sum to be paid by the defendant as rent for a stone quarry, untruly, for the purpose of obtaining from another person a portion of that sum; when, as between themselves, \$250 was all that was to be paid by the defendant; *Held* that if this was true, it was a fraud, which a party was not allowed to set up as a defence. *ib*
11. Where a statement of a witness is simply objected to, in general terms, at the trial, it cannot be urged, on appeal, that it was inadmissible because it was the *opinion* of the witness. If the ground of the objection is not stated, at the trial, it will be deemed to have been waived. *Walker v. The Bris Railway Co.*, 260
12. The acts and declarations of a vendor, in respect to the property sold, after the sale, are not competent evidence to impair or destroy the purchaser's title. *Knight v. Forward*, 811
13. In an action upon a lost note, the plaintiff, himself, testified, on the trial, that he let the makers take and show the note to a neighbor, to see if an indorsement thereon was right; that they were gone some time, and one of them returned in about three hours, and said he had lost the note; and the witness testified that he had not seen it since. *Held* that on this evidence, it was fair to infer that the maker who consulted a neighbor as to the validity of the indorsement, acted not only for himself, but for the other maker; and that the statement made by him

- on his return, was admissible against the other maker, and the jury might find, upon that evidence, that the note was lost. *Ellenwood v. Fultz*, 321
14. In a suit in equity, brought by one of the heirs of a grantor, against another, to set aside a deed executed to the defendant, and to have the plaintiff declared entitled to the undivided half of the premises conveyed, as one of the heirs of the grantor, on the ground that the grantor was induced to execute such deed by false and fraudulent representations, and by undue and improper influence, and that the grantor was of unsound mind, evidence is admissible, on the part of the defendant, tending to show that from the time he became of age he had, at the request of his father, (the grantor) remained upon the farm embraced in the deed, and devoted his time and labor to the same, for sixteen years, without compensation, upon the promise and agreement of the grantor that he should, in consideration thereof, have the farm, in the end, and that he (the grantor) would either deed or will it to him. *Campbell v. Fairbanks*, 460
15. Such evidence is admissible on several grounds: 1. As tending to show a defence to the action. 2. Upon the question of the validity of the deed, as against the allegation of undue influence. 3. As a circumstance touching the question of the grantor's sanity or insanity; and to show the reasonableness and propriety of the deed, and that its execution was a sane and just act, and evinced the exercise of reason and judgment. *ib*
16. Where the defendant, in such an action has no remedy at law, to get compensation for the labor of years, except through the contract he offers to prove; and where, if such a contract existed, he was induced thereby to remain with his father, and labor for his benefit, for several years, relying upon his promise that he should ultimately, either by deed or will, have the farm upon which his labor was thus bestowed, then the case presents the precise circumstances under which the court will refuse to interfere to set aside the conveyance; because

it cannot exercise its jurisdiction by so doing, and at the same time do justice to the defendant. *ib*

17. Competent evidence cannot be rejected on the ground that it is inconclusive, or of little weight. *Mars v. The People*, 611

See ASSAULT AND BATTERY.
 ATTESTING WITNESS.
 CRIMINAL LAW, 7 to 20.
 PROMISSORY NOTES, 1, 5, 6, 7.
 WITNESS.

EXECUTION.

See COMPLAINT.
 DEBTOR AND CREDITOR.
 EQUITY.

EXECUTORS AND ADMINISTRATORS.

See LANDLORD AND TENANT. 6.

EXPERTS.

See EVIDENCE, 7.-

EXPRESS COMPANIES.

1. Where a package was received by an express company, for transportation, at its regular place of business, and receipted to the owner, and was put on the shipping-bill, for its place of destination; and after this, the agents of the company could give no account of it whatever, or at least did not, and professed to be unable to do so; *Held* that the very fact that after receiving it in this way, the defendants' agents paid so little attention to the package as to be unable to give any other or further account of it, was sufficient, of itself, to justify a finding of loss by negligence of the company, and even of gross negligence, if that were necessary to create the liability and uphold the judgment. *Wescott v. Fargo*, 349
2. It is no objection to an action against an express company, to recover for a loss of goods entrusted to it for transportation, that the plaintiffs are

corporators or members of the company. 35

See CARRIERS.

EXTRA ALLOWANCE.

See COSTS, 4, 5, 6, 7.

F

FALSE REPRESENTATIONS.

See EVIDENCE.
WARRANTY, 3, 4.

FOREIGN CORPORATIONS.

Although another State cannot create a corporation within this State, yet it is no objection to the corporate acts of a foreign corporation done in this State that they are authorized by a meeting of the directors, held in this State, when the acts so authorized are not repugnant to the policy of our own laws. *Smith v. Alford*, 415

See USURY.

FORGERY.

See EVIDENCE, 6, 7.

FRAUD.

See EVIDENCE, 10.
WARRANTY, 3, 4.

FRAUDULENT SALES.

See VENDOR AND PURCHASER, 5, 6, 7, 8.

FUND IN COURT.

See SURREGATE.

G

GRANT.

1. Where a grantor with warranty has no title to the premises conveyed,

at the date of the conveyance, but he subsequently acquires an estate therein, such acquired estate will enure to the benefit of the grantee; if not by estoppel, it will upon the principle of avoiding circuity of action. *Taft v. Munson*, 31

2. A mere grant operates upon the possession; it simply conveys the estate and interest which the grantor had, in the premises granted. If the grantor had no estate, there is no estate to be accepted; so that on the conveyance by grant only, of lands, by deed or mortgage, the grantee is not estopped from averring that his grantor had nothing in the lands granted. 35

3. But where the conveyance is by warranty, the rule is different. In that case, the warranty will rebut and bar the grantor, and his heirs, of a future right; not because a title ever passes by such a grant; but the principle of avoiding circuity of action interposes and prevents the grantor from impeaching a title to the soundness of which he must answer, on his warranty. 35

GUARANTY.

See AGREEMENT, 9.

GUARDIAN AND WARD.

1. A guardian in socage has the right to make a lease of the lands of his ward, in his own name; and one so made will bind the infant as effectually as if made in his name. *Thacker v. Henderson*, 271
2. A general guardian has, as such, the same power, in that respect, as a guardian in socage. 35
3. For injuries to the premises covered by the covenants in a lease, the minor, as owner in fee, has no right of action, except upon the lease itself. Only one action can be maintained, for such injuries, and that action must be on the lease. 35
4. A lease executed by a guardian, of his ward's land, is assignable; and the assignee can recover damages for breaches of all covenants therein

which may be assigned; provided he is also owner of the reversion. This embraces covenants by a lessee to work the farm in a good farmer like manner, to keep it in good condition, to seed down a part, &c. &c. *MORGAN, J.*, dissented. *ib*

5. The contract of a guardian for the sale of his ward's real estate is wholly unauthorized, and will not bind either the ward or his estate; except so far as the guardian has the power to deal with the possession. *ib*
6. If a lease executed by a guardian does not cover the whole period of the ward's minority, then there is a reversionary interest in the guardian, which he has a right to assign. *ib*
7. Such interest will pass under a contract of sale, executed by the guardian and approved by the court; and the purchaser will have such a reversionary interest in the premises as will enable him to recover damages for an injury to such interest. *ib*

H

HIGHWAYS.

1. An overseer of highways has no right, in making repairs upon a highway within his district, although in other respects suitable and proper, to change a natural watercourse, or the natural course of surface water drainage, so as to cast the water upon the lands of an owner abutting upon a highway where it had not been previously accustomed to flow; or to increase, considerably, in volume and quantity, either the water in a natural watercourse, or from surface drainage, flowing upon such land, to the injury of the owner thereof. *Moran v. McCleams*, 185
2. This results from the right of the public in a highway. It is a mere right of passage over the soil; and although the public has the right to alter, shape and fashion its roadway in such a manner as to render it convenient, safe and useful for the purposes of passage, still, adjoining and abutting lands, outside of the way, are not servient estates to this

right of way, so as to authorize the public, through its officers, to change natural watercourses, or the natural course of surface waters, in regard to such lands, to the injury of the owners, with impunity. The public must construct and repair their way with reference to the rights of adjoining owners of lands. *ib*

8. An overseer of highways cannot, by any act of his own, either confer any new rights upon the public, or impose any new burdens upon individuals to their injury. *ib*
4. In the discharge of his official duty as overseer, he has the right to make such change as he may deem necessary, not only by way of repair of the road, but by way of preventing further injury, provided that, in so doing, he does not interfere with the rights of others. *ib*
5. He may, for this purpose, restore a highway to the condition it was in at a former period when a change was made in a ditch and sluice, and restore the public to all the rights they then had which have not become forfeited; yet if he undertakes to restore, he should restore the way, in all respects, to the condition it was in at such former period, and the public to the rights it then had. *ib*
6. He has no right to leave a sluice which would carry off water from the ditch to his own land, closed, and open a sluice which will carry the water that should rightfully pass to his own land, upon the lands of his neighbor. *ib*

I

INCHOATE RIGHTS.

Inchoate rights, generally, derived under a statute, are lost by its repeal; unless saved by express words in the repealing statute. *Richardson v. Puller*, 67

See MARRIED WOMEN.

INJUNCTION.

See BONDING TOWNS, 9.
NUISANCE, 10.

J

JUDGMENT.

1. The legislature, in the enactment of section 871 of the Code, by referring to *the judgment* to be appealed from, did not intend to refer to it as a judgment to be afterwards increased by interest, but to the judgment as it was at the time the party appealed from it. *Humiston v. Ballard*, 9

2. Judgments of courts of law are to be reviewed according to the course of the common law, unless a statute otherwise provides. A suit cannot be instituted in equity to set aside a judgment at law, for want of jurisdiction in the court or judge before whom the proceeding was had and the judgment recovered. *Ayres v. Lawrence*, 454

See BONDING TOWNS, 10.
JUSTICE OF THE PEACE, 1, 2, 4, 8, 9.
LIES.

JURISDICTION.

State courts have jurisdiction of actions prosecuted by assignees, appointed under the United States bankrupt act, to set aside conveyances made by the bankrupt when insolvent, and within four months before the filing of the petition in bankruptcy against him, with a view to give a preference to one of his creditors, who had reasonable cause to believe such bankrupt was insolvent and that the conveyance was made in fraud of the provisions of that act; although the cause of action is one created by the act of congress. *Gilbert v. Priest*, 889

See BONDING TOWNS, 1, 5, 7.
JUSTICE OF THE PEACE, 1, 6, 7, 8, 9.

JURY.

1. It is the clear province of the jury to deal with facts; especially in cases of conflict of testimony; and the province of the jury only. *Morse v. Sherrill*, 21
2. When there is no decided preponderance of evidence on either side,

the case depending mainly upon the conflicting testimony of the parties themselves, who are equally respectable and unimpeached, the jury are the proper persons to decide between them, as to whose testimony is entitled to the greatest credit. *ib*

See CRIMINAL LAW, 15.
NUISANCE, 7.

JUSTICES' COURTS.

1. Where the complaint, in a justice's court, did not, in terms, charge the defendant with breaking and entering the plaintiff's close, but the facts which constituted the real cause of action were stated, and these showed that the injury was occasioned, not by breaking and entering, but by opening a sluice in a highway and turning the waters in the ditch of said highway upon the plaintiff's land to his injury; *Held* that the allegation of breaking and entering was clearly, upon the face of the complaint, mere surplusage; and that there was no error committed by the justice in so amending the complaint as to allow the true cause of action therein stated, only, to remain. *Moran v. McCleams*, 185
2. The only demurrer to a complaint which is allowed in a justice's court, by the present law, is when the complaint is not sufficiently explicit to enable the defendant to understand it, or when it contains no cause of action. Neither of these causes of demurrer applies to an objection, that the action is brought in a wrong county. *Lapham v. Rice*, 485
3. Although in a summons, issued by a justice of the peace, in an action by town officers of one county against town officers of another county, the official titles of the respective parties are stated, yet if it be not stated that the plaintiff sues, or the defendant is sued, in his official capacity, the statement of the official titles of the parties operates as a mere *descriptive persona. ib*
4. As such, it is mere surplusage, and will not prevent the plaintiff from complaining against the defendant in regard to a mere private matter existing between the two, and un-

connected with the official capacity of either. Consequently, a dismissal of the suit before a complaint is put in, showing that the action is connected with the official character of the parties, would be erroneous. *ib*

5. There seems to be no method by which, in a justice's court, the defendant, in a case where the action is commenced in a wrong county, can avail himself of the objection, except as a ground of nonsuit on the trial, as at common law, where the objection is not open to a demurrer. *Per TALCOTT, J.* *ib*

6. In a justice's court, the objection that the action is brought in a wrong county, if well founded, must necessarily defeat the action itself. *ib*

See APPEAL, 2, 3, 5, 6.

JUSTICE OF THE PEACE.

1. Where a justice of the peace obtained jurisdiction of an action, in form replevin, by a summons duly issued and served, the appearance of parties, and the joining of issue therein; and after the cause had been twice tried before juries, neither of which could agree upon a verdict, the cause was, by agreement of parties, submitted, upon the evidence taken, to the justice, who rendered a judgment therein; *Held* that whatever defects there might have been in the affidavit and form of the bond, they should be regarded as waived; and that, on appeal from the judgment, the court would not enter upon an examination of such defects. *Alford v. Stevens,* 29

2. If there is sufficient evidence, if believed by a justice of the peace, to sustain a judgment, the judgment rendered will not be reversed, on appeal, because it was given without sufficient evidence to sustain it. *ib*

3. When there is a conflict in the evidence, it is for the justice to determine which is most credible. *ib*

4. When the judgment of a justice of the peace is sustained by positive, direct and corroborating evidence, sufficient to uphold a judgment, it is not the duty of the reviewing

court to measure, in nice scales, the weight of conflicting testimony. *ib*

5. A short summons can only be issued, by a justice of the peace, against defendants who come within the class of persons, who, by the non-imprisonment act of 1881, (3 K. S. p. 462, §§ 212 to 215, 5th ed.,) cannot be proceeded against by long summons or warrant. And that the defendant belongs to that class must be made to appear to the justice by affidavit. *Eus v. Perry,* 40

6. A short summons is an extraordinary process, and can only issue on proper preliminary proof; and as no jurisdiction is obtained, without such proof, a judgment appearing to have been rendered by a justice of the peace without it, is to be presumed void, until the party upon whom the onus is shown supplies that proof. *ib*

7. A mere memorandum, "aff't, short summons," upon the justice's docket, does not furnish the evidence that the justice had jurisdiction; and if there be no appearance in the cause, by the defendant, there can be no waiver of the objection that the court has no jurisdiction. *ib*

8. In an action brought to recover the possession of property upon which the plaintiff had levied, as constable, under an execution issued by a justice of the peace, the plaintiff produced, upon the trial, the docket of the justice, which showed the issuing of a short summons against the defendant, returnable in three days, and returned duly served. All that appeared beyond this, on the docket, was "aff't, short summons issued." No affidavit was proved or produced. And the defendant did not appear, on the return day; but the plaintiff proceeded, in his absence, to obtain judgment, on an account. *Held* that the plaintiff failed to show jurisdiction, in the justice, to render the judgment; and that the judgment, so far as appeared from the proof on the trial, was clearly void. *ib*

9. But when the judgment was offered in evidence, the defendant's counsel not only permitted the docket to be read in evidence, without objection,

but admitted it to be evidence. The question of the validity of the judgment was not raised, on the trial; and the judge's attention was not directed to any want of validity in it; nor was it made a matter of contest. *Held* that after judgment it was too late to raise the objection that jurisdiction in the justice was not proved. That at that stage of the cause, the objection was to be deemed waived. *ib*

See ACTION, 5, 6.

L

LANDLORD AND TENANT.

1. One who enters into possession of premises as the tenant of another, under a lease rendering rent, cannot, while that possession continues, dispute the title of his landlord. *Tompkins v. Snow*, 525
2. And if, during such possession, the tenant takes a contract for the purchase of the land—which is equally an acknowledgment of the title of his landlord—and being unable to perform, surrenders it, and agrees to resume his footing as a tenant, no adverse possession can commence while that possession continues, as against the landlord, or his heirs. *ib*
3. This rule of law applies not only to the tenant himself, but to everyone who succeeds to his possession by his permission and consent. *ib*
4. The lessor or vendor of land would lose the protection of this rule of property if the tenant or vendee could make a fraudulent title to a third person, let him into possession, and then such third person should be permitted to claim adversely under the fraudulent title thus created by the tenant in possession, and who could not himself be permitted to set up even a valid title, without first restoring the possession. *Per* TALCOTT, J. *ib*
5. The possession of an assignee of the tenant cannot be adverse; and such possession cannot, by any mere lapse of time, ripen into a title, as against

the landlord, or those claiming under him. *ib*

6. The administrators of a deceased landlord, cannot, by any act or omission of theirs, whether done innocently or otherwise, affect the title of one claiming under their intestate. And their unauthorized receipt of money upon a contract of their intestate, never valid and long since abandoned, will not change the position of the assignee of a tenant with regard to the true owner, or turn his possession as tenant into an adverse possession. *ib*

See PRESUMPTION.

VAN RENSSELAER LEASES.

LEASE.

1. Where an indenture of lease appeared, by its date, to be seventy-seven years old, at the time of the trial; and its existence was traced back for over twenty-five years; and during that time it appeared to have been in the possession of the grantor's devisee and his assigns, who were its proper owners; and in addition to this, it appeared from the presumption drawn from the evidence of a former owner, that the grantee under the indenture owned the premises conveyed by it; *it was held* that this was sufficient to render the indenture admissible in evidence, without proof of possession under it. And that the indenture, if admissible, proved the seisin of the grantor, at the time of its date. *Lyon v. Adde*, 89
2. Although the assignee of a lease, only, cannot recover for injuries to the reversion, yet where such assignee is also the owner of the reversion, he may recover for such injuries. *Thacker v. Henderson*, 271

See GUARDIAN AND WARD.
PRESUMPTION.

VAN RENSSELAER LEASES.

LEGISLATURE.

See CONSTITUTIONAL LAW, 9.
SUPERINTENDENT OF THE POOR, 3.

LIEN.

When a lien is once extinguished at law, it cannot be revived again.
Hill v. Piskey, 200

See MORTGAGE, 2.
SURREGATE, 1, 3, 4.

LOST NOTE.

See EVIDENCE, 13.

M

MALICIOUS PROSECUTION.

1. Where a party, knowing that a certain act does not constitute a crime, procures another to be indicted for a crime; or where he supposes and believes that such act, if done by another, would constitute a crime, and falsely and maliciously accuses such other of the commission of the act, and procures him to be indicted; an action for malicious prosecution lies. *Dennis v. Ryan*, 145
2. Thus, an action will lie for the malicious prosecution of the plaintiff by the defendant in causing the former to be indicted and tried for the crime of forgery, alleged in the indictment to consist in the erasure, from the back of a money bond which the defendant was under obligation to pay, of an indorsement of a payment thereon. *ib*
3. A charge that such an action cannot be maintained by the plaintiff, unless the jury are satisfied, from the evidence, that the accusation made by the defendant, on which the indictment was found, was known by him to be false and unfounded; but that if he made the complaint, knowing it to be false and unfounded, and by that means procured the plaintiff to be indicted and brought to trial, the action will lie, even though the charge made did not constitute the crime alleged, or any crime—is not erroneous. *ib*
4. The act charged, if true, would not constitute a forgery of the bond, because the indorsement is no part

of the bond, but only evidence of a payment thereon. *ib*

5. It is impossible for a party to make for himself probable cause, out of his own falsehood. *Per Johnson, J.* *ib*

MANDAMUS.

See NEW YORK, (CITY OF,) 4, 5.

MARRIED WOMEN.

1. The obligation of a married woman, except in the cases where her separate property is involved, is void. *Hansen v. De Witt*, 53
2. A married woman is not liable upon a promissory note signed by her as surety for another, or upon one given in renewal thereof; although she has a separate estate; where there is nothing to show a charge, or an intent to charge such estate, or that her estate was benefited, and no evidence (except by implication) to show that the note was given upon the credit of such estate. *ib*
3. The act of April 11, 1849, (*Laws*, ch. 875, § 8,) which provides that any married woman may convey real estate "in the same manner, and with the like effect, as if she were unmarried," repeals, as to married women and their separate estates, the provisions of the Revised Statutes requiring a private examination apart from their husbands upon their acknowledgment of the execution of conveyances. *Richardson v. Pulver*, 67
4. A married woman, therefore, having a power of appointment over lands of which the legal title is vested in a trustee, may execute an instrument desiring the trustee to execute a conveyance of the premises to her, in pursuance of a power contained in the trust deed; and may legally acknowledge the execution of such instrument in the usual form, without any private examination. *ib*
5. The validity of the execution of such a request to the trustee is to be tested by the form of acknowl-

edgment at that time requisite, for married women. *ib*

6. The claim that the acknowledgment of such an instrument should be in accordance with the Revised Statutes is, at most, based upon an inchoate right, and the repealing statute is valid as against it. *ib*

MORTGAGE.

1. On the 18th day of January, 1848, G. P., being the owner in fee of certain lands, let his son, M. B. P., into the possession thereof. On the same day, M. B. P. forged a deed of said lands, purporting to convey the title from G. P. to him, and recorded such deed in the clerk's office, May 27, 1850. On the 1st of October, 1860, he executed a mortgage of said lands to the loan commissioners, for \$1000, money then loaned to him by them; which mortgage was in the usual form, and contained a covenant of seisin and warranty. Such mortgage was, at the time it was executed, duly entered upon the books of the loan commissioners, kept and provided for that purpose, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1858, was recorded in the county clerk's office, which deed purported to be executed by M. B. P. and wife to G. P. On the 16th of December, 1859, G. P. conveyed said lands to M. B. P. by warranty deed, which was duly recorded January 14, 1860. And on the 31st day of January, 1867, M. B. P. sold and conveyed the land, by warranty deed of that date, to the plaintiff, who paid full value therefor, without actual notice of the loan office mortgage. A statute foreclosure of said mortgage being commenced, on the 28th of October, 1868, this action was brought to restrain such foreclosure, and to have the mortgage decreed void as against the plaintiff. *Held*, 1. That the mortgage in question was an instrument within the recording acts. 2. That although the mortgagor, at the date of the mortgage, had no title to the premises, yet he having, while in possession of them, and while his covenant of warranty was in full force, become vested with the title in fee, such

title enured to the benefit of the mortgagees; and the mortgagor, and those claiming title from him subsequent to the mortgage, were estopped by such covenant of warranty.

3. That as between the mortgagor and the mortgagees, the interest of the latter, in the lands, became, upon the mortgagor's subsequently acquiring title, as perfect as if the mortgage had been executed by M. B. P. after the date of his title. And that the mortgagees did not lose such interest by the mortgagor's conveyance to the plaintiff. 4. That the recording acts were also controlling in favor of the defendants, the mortgagees. *Taft v. Munson*, 81

2. On the 7th of August, 1855, certain premises owned by H. became subject to the lien of a judgment on that day docketed against him. On the 24th of August, 1855, H. executed to M. a mortgage on the same premises, for \$5809, which was recorded on the 27th of the same month. On the 22d of November, 1856, the premises were sold, upon an execution issued on said judgment, and bid off by G. On the 4th of May, 1858, a deed of the premises was executed by the sheriff to E. G., the assignee of the certificate of sale. E. G., on the 1st of June 1859, conveyed the premises to M., the mortgagee, who still remained the owner of the mortgage, never having taken any steps to effect a redemption of the premises from the sale under the prior judgment. On the 20th of May, 1860, M. deeded the premises to L. H. The mortgage was subsequently placed in the hands of A., who re-transferred it to M., and M. transferred it to the plaintiff. In proceedings by the creditors of H., against him and L. H., it was decreed that L. H. held the title in trust for H., and in fraud of creditors; and both were ordered to convey to a receiver. In an action to foreclose the mortgage, the defendant P. claimed through a purchase from the receiver, and stood upon that title, claiming that the mortgage was merged, and the lien thereof extinguished, by the sale under the prior judgment, and by the conveyance of the premises to M., the mortgagee. *Held*, 1. That the effect of the judgment, and the failure to redeem, by the judgment

debtor or the subsequent incumbrancer, was to transfer the title to the purchaser, and to extinguish all liens inferior to the judgment. 2. That the purchase of the premises by M., the mortgagee, could not have the effect to revive his mortgage as a lien. 3. That upon this view of the case, the doctrine of merger had no just application; for when M. purchased the mortgaged premises, his equitable estate was gone. 4. But that, conceding that when M., the mortgagee, took a conveyance to himself of the fee or equity of redemption, his mortgage lien was in full force and effect, unimpaired by the sale under the judgment, the same was extinguished by being sunk in the legal estate; and could not be upheld by the court, as a lien. 5. That the title acquired by the defendant under the deed from the receiver, was freed from the lien of the mortgage. *Hill v. Paisley*, 200

N

NATURAL GAS COMPANIES.

See CONSTITUTIONAL LAW, 7 to 12.

NEGLIGENCE.

See CARRIERS, 1, 11.
DAMAGES, 4, 5, 6, 9.
EXPRESS COMPANIES, 1.

NEW TRIAL.

See APPEAL.
VERDICT, 2.

NEW YORK, (CITY OF.)

1. The act of 1872 (ch. 375, § 2) requires the comptroller of the city of New York, "to allow and pay the bills of the several proprietors of the newspapers in said city and county for all city and county advertising *actually done* prior to January 1, 1872" Held that it was not the effect of this provision to legalize all previously illegal demands, and to require the payment of the bills of mere volunteers, the same as

those of persons publishing under legal authority; and there was nothing in the act demanding such an interpretation. *The People ex rel. Pomeroy v. Green*, 890

2. That the object of the statute, so far as the newspapers were concerned, evidently was to provide an appropriate procedure, with an adequate fund, for the speedy liquidation and payment of all strictly legal obligations, and also of all just and honest claims of an equitable, if not of a technical legal character. *ib*
3. That there was the fullest intention of providing for publishers who had acted under legal authority; or at least in good faith under color of such authority, but none of presenting any part of the public funds to those who had acted in violation of law, and without a shadow of authority. *ib*
4. Held, also, that as to claims for services done apparently without any contract express or implied, and without any legal authority, or even official request, the allowance of such claims would be pure gratuity, and the court would not, by *mandamus*—a writ which only issues in cases of unquestionable legal right—direct the board of apportionment and audit even to consider them. *ib*
5. But that where services were performed under color of legal authority, and were beneficial to the city, and necessary, they came within the provisions of the act of 1872; and that a mandamus would be issued, directing such board to audit and allow the bills for such services. *ib*
6. The plaintiff, at the charter election in December, 1869, was elected to the office of justice of the district court in the city of New York, for a term to commence on the 1st day of January, 1870; and on that day he entered upon the duties of the office. At that time, the salary of a police justice, as fixed by a resolution of the common council, adopted December 31, 1869, under the supposed authority of law, and as paid, was \$10,000 per annum; and this was the specified salary paid to a police justice when, in

April, 1870, an act was passed by the legislature, providing as follows: "The mayor and comptroller are hereby authorized to fix the salaries of the civil justices of the city of New York, or any or either of them, as they may deem the legal business of the respective districts to justify, *not exceeding the salary now paid to the police justices of said city.*" On the 21st of October, 1870, the mayor and comptroller, in pursuance of the authority given by this act fixed the salary of the plaintiff, as such civil justice, at \$10,000. *Held* that whether the ordinance of December 31, 1869, by which the salary of each of the police justices was fixed at \$10,000, was legal and valid, or not, it having been adopted under the supposed authority of law, and \$10,000 being the sum paid to police justices at the time of the passage of the act of April, 1870, and the mayor and comptroller not having exceeded that limit by their action in fixing the salary of the plaintiff, on the 21st of October, 1870, their official act was valid, and in accordance with law. *Quinn v. The Mayor &c. of New York*, 595

7. *Held, also*, that it was plain that the legislature, by the act of April, 1870, meant to grant to the mayor and comptroller a discretion to fix the salaries of the civil justices at any amount not exceeding the sum *then paid* as salary to a police justice; and that it was therefore vain to assert that the salaries of the police justices had been *unlawfully* fixed at \$10,000 per annum; that not being the question, but rather, what were the sums *then paid*, as such salaries. *ib*

8. *Held, further*, that the city was liable for the plaintiff's salary, at the rate of \$10,000 per year, though the board of apportionment had failed to provide for its payment, and the city corporation set up as a defence that there was no money in the treasury appropriated or applicable to the payment of such salary. *ib*

9. The act of the board of apportionment, in setting apart or appropriating a certain sum for the payment of the salaries of the district court justices, for a particular year, which sum thus appropriated is less than

the aggregate amount of such salaries as lawfully fixed, is not a "regulation" of such salaries, so as to change the amounts of the salaries as already fixed. *ib*

10. Before the board of apportionment can change the amount of a specific salary they must act directly on the question of the amount of the salary, and explicitly make the change. *ib*

11. The change or regulation of the salary to a different sum will not be inferred from the indirect action of the board in setting apart an aggregate amount to meet the payment of the same and similar salaries. *ib*

12. The district court justices of the city of New York are not attached to any of the "departments" of the city; nor is the salary due to one of them, already fixed by competent authority according to law, before the passage of the act of 1872, (*Laws of 1872, ch. 9*.) a liability incurred by him. In other words, the salary of a district court justice, lawfully fixed prior to 1872, which may fall due during that year, is not a liability *incurred* by that officer, against the prohibition of the law of 1872. *ib*

See ASSESSMENTS FOR STREETS, &c.

NUISANCE.

1. The plaintiffs were incorporated in 1808, by a perpetual charter allowing them to erect a toll-bridge across the Chenango river, for the accommodation of the public; and it was declared to be unlawful for any person to erect a bridge, or establish a ferry, within two miles of the plaintiffs' bridge. Under this charter, the plaintiffs erected their bridge, and had ever since maintained it. By an act of the legislature, passed in 1855, the Binghamton Bridge Company was incorporated, for the purpose of constructing a toll-bridge across the same river, *within two miles of the plaintiffs' bridge*, and a bridge was built by them, about 80 rods above the plaintiffs' bridge, under the direction of L., (the defendants' testator,) as contractor, who was a stockholder of the Binghamton Bridge Company, and owned

the land at one end of said bridge. It was completed prior to August 5, 1866, and was opened as a toll-bridge, and used as such until it was carried away. L. repaired the bridge, prior to its destruction, under contracts with the company, of which he was a director at the time of his death, in 1868. On the 17th of March, 1866, the Binghamton bridge was swept away by a freshet, and was carried against the plaintiffs' bridge and destroyed it. In an action brought by the plaintiffs against the B. Bridge Company, to restrain the building of the bridge, and for damages, the Supreme Court of the United States decided that such bridge was both contrary to law, and an infringement of the plaintiffs' legal rights. *Held*, 1. That the bridge was a private nuisance. 2. That the defendants, as personal representatives of L., who had erected and continued such nuisance, were liable to the plaintiffs for the damages caused by the Binghamton bridge; including the diversion of tolls, and the value of the bridge destroyed. *Chenango Bridge Company v. Lewis*, 111

1. The liability for a nuisance is not restricted to persons who occasion the whole of it; but those who are guilty of doing but a part are liable, also, if they do it with like intent. *ib*
3. Thus, where the nuisance is not the structure, but the illegal use of it, the liability attaches not only to those who are engaged in the use, but also to those who erected the structure with the knowledge, or the intent, that it should be put to the illegal use. And the liability of the builder is precisely the same as if he had been the employer, instead of the employee. *ib*
4. It is the general rule that the creator of a nuisance is liable for its continuance. To this rule there is an exception, where he is not in possession of the premises, which are occupied by other persons claiming them as their own, and not holding as his tenants. *ib*
5. To maintain an action to abate a nuisance, since the remedy is by action and not by writ, the plaintiff must allege that he was the owner of the freehold affected by the nuisance,

at the time when the several acts complained of were committed; and the action must be against the owners in fee, in cases where it is brought to abate the nuisance. *Hutchins v. Smith*, 251

6. Since the Code, a party injured by a nuisance created or continued by another, has a right to come into a court of equity and ask for relief by a perpetual injunction restraining the defendants from so using their property as to annoy him and prevent the enjoyment of his premises, and for damages, as incidental to such equitable relief. *ib*
7. Where defendants have a right to have the issues in the action tried by a jury, if they choose to have the same settled under the rule, but instead of this, the issues are brought to a hearing before the court, without objection, the defendants will be held to have waived a trial by jury; and the findings of the court are to stand in the place of a verdict of a jury. *ib*
8. And if, in an action for a nuisance, the court reaches the conclusion that the plaintiff's rights have been invaded by the acts of the defendants, so that they have been guilty of maintaining a nuisance, the plaintiff will be entitled to "judgment for damages, or for removal of the nuisance, or both." *ib*
9. Where, by the erection and use of lime kilns by the defendants, upon their own premises, in close proximity to the residence of the plaintiff, the plaintiff's premises were, by reason of the smoke, gas and dust issuing from the kilns, rendered unfit for a comfortable habitation, and the smoke and gas, when inhaled by persons of sensitive lungs, were alike unpleasant and uncomfortable, as well as, to some extent, detrimental to health; *it was held* that the plaintiff was entitled to enjoy his premises free from the presence of the smoke, gas and dust proceeding from the kilns; and that the defendants had no right thus to pollute the air and disturb the comfortable occupation and enjoyment of his premises by the plaintiff; and that their doing so, amounted to a nuisance. *ib*

10. *Held, also*, that the plaintiff was entitled to a perpetual injunction to restrain the continuance of the nuisance caused by operating the lime kilns, to his annoyance or injury; and to damages for past injuries. *ib*

O

OFFICERS.

1. The rule justifying an officer in the seizure of property under executions good on their face, but really void as to the party, for want of jurisdiction, is intended to be a rule of protection, merely. *Rus v. Perry*, 40
2. Although the officer may *defend* under such process, he cannot build up a title upon it, so as to maintain actions against third persons. *ib*

OVERSEER OF HIGHWAYS.

See HIGHWAYS.

P

PARKS.

See ASSESSMENTS FOR STREETS, &c.

PAYMENT.

See PRESUMPTION.

PEOPLE,

See COSTS, 8.

PLEADING.

See ANSWER.
COMPLAINT.
COUNTER CLAIM.
JUSTICES' COURTS.

PRACTICE.

See APPEAL.
DISCONTINUANCE.

PRESUMPTION.

1. In the case of an obligation which can be extinguished by an act *in pais*—such as payment—there is an absolute presumption of payment, after the lapse of twenty years. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made, within the period of twenty years. *Lyon v. Adda*, 89
2. There is also another presumption—a presumption of fact, or more properly, in the nature of evidence—which can be drawn by a jury from the circumstances of the case, *in loco* *than twenty years*. *ib*
3. But when the obligation can be extinguished only by deed, the rule is different. In that case, there is no presumption of law at all; but there is the same presumption, in the nature of evidence, as in the other cases. *ib*
4. It is a presumption to be drawn from all the circumstances of the case; but mere length of time, by itself, will never raise it. That one circumstance, of itself, is insufficient; but it is a circumstance from which, in connection with other circumstances, the satisfaction of the obligation may be found by a jury, or decreed by a court of chancery. *ib*
5. At law, if there has not been a verdict, the issues are sent back, to be tried before a jury. In chancery, the presumption is drawn by the court, from all the circumstances of the case, as it would be by a jury; and not as a presumption of law. *ib*
6. When the relation of landlord and tenant has once been established, under a sealed lease, the mere circumstance that the landlord has not demanded the rent, cannot justify the presumption that he has extinguished the right to it by a conveyance. *ib*
7. Courts can draw no conclusion of *law* from the lapse of *time* during which rent has remained unpaid; but any presumption which they

may raise must be drawn from all the facts and circumstances of the case as evidence, in the same manner in which a jury would draw inferences of fact. *ib*

8. It was claimed by the plaintiff that any presumption of a release was rebutted by proof to the contrary; while the defendant insisted that the presumption did not in the least depend upon the truth of the matter. *Held* that the court would neither throw the fact that no release had been given, out of the account, nor allow it to be conclusive, in rebutting the presumption. That that fact might well be important in discovering the releasor's intention; and that the court ought to require a greater lapse of time, and more unequivocal acts, to establish the presumption, than if it were in doubt as to whether a release had been given in fact. *ib*

9. *Held, also*, that if the case were examined upon the theory of a presumption of fact, even with the proof that no rent had been claimed, but with proof to a degree of certainty, that no release had ever been given, there was sufficient in the case to warrant a finding of the referee against the presumption of a release, and to justify the court in holding that no such presumption arose from twenty-five years' lapse of time. And that the case was easily distinguishable from the cases where a presumption has been held to arise from the peculiar and special circumstances upon which the presumption might be sustained. *ib*

10. In an action to recover rent reserved in an indenture of lease executed in 1794 to Abner Bull, it appeared that in 1817, and previously, the premises owned by the defendant were part of a farm known in the neighborhood as the "Abner Bull farm," and were so called by a witness who, in 1817, conveyed to the defendant's grantor. *Held* that this was a sufficient identification of the premises; that the Abner Bull who owned the farm at so early a day, and so near the date of the grant, would be presumed to be the grantee in the indenture; and in the absence of proof that he owned two farms, that the one called

by his name would be presumed to be the same one conveyed to him by the indenture. *ib*

See AGREEMENT, 1.
BONDING TOWNS, 6.
EVIDENCE, 1.
REFEREE, 1.
RENT, 2, 4.
PROMISSORY NOTES, 1.
VAN RENSSELAER LEASES.

PRIVATE PROPERTY.

See CONSTITUTIONAL LAW.

PROMISSORY NOTES.

1. By a well established rule of law, the giving of a promissory note is *prima facie* evidence that, at the date of it, there was a settlement of all demands between the parties, and that the note remained as the only claim existing between the parties to it; or at all events, from the maker to the payee. *Dutcher v. Porter*, 15
2. A *bona fide* holder of commercial paper to which, as between maker and payee, there is a good defence, is entitled to be protected only to the extent of the value which he has paid. *MULLIN, P. J., dissented. Huff v. Wagner*, 215
3. If the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*. *ib*
4. There is no reason for any distinction between the case of a purchaser for money, and one where the note is exchanged for property. *ib*
5. In an action upon a promissory note, brought by an indorsee, against the maker, the defendant set up as a defense, that the note was obtained from him, by the payee, by means of false and fraudulent representations made on the sale of a patent right; and gave evidence showing the fraud. The plaintiff claimed to be a *bona fide* holder of the note, for value, and introduced evidence tending to establish that fact. It appearing, by the plaintiff's evidence, that the

consideration he gave for this and another note, purchased by him of the payee at the same time, was a span of horses, the defendant offered to show "that the property traded for the notes was not, at the time of the trade, worth more than half as much as the amount of the notes." This evidence was rejected as inadmissible, and the plaintiff obtained a verdict. *Held* that the evidence offered was improperly rejected, and that a new trial was properly granted by the special term, upon that ground. *ib*

6. *Held, also*, that the evidence was admissible, upon the ground that where the question is as to whether the plaintiff is a holder in good faith, all the circumstances of the transfer, and the relations and dealings between the parties, are admissible in evidence. That the fact that the plaintiff gave, in horses, but fifty cents on the dollar for the note of a perfectly responsible party, and within four days after the note was given, was a circumstance clearly admissible to be proved, on the question of good faith. *ib*

7. *Held, further*, that the evidence was not inadmissible because not pleaded; the fact that the note was obtained by fraud having been proved without objection, and the evidence rejected being upon the issue presented by the plaintiff in reply to the defense of fraud, and coming in by way of rejoinder to the plaintiff's reply. *ib*

8. A note, valid in the hands of the holder, is property, which may be sold at any price. *Harger v. Wilson*, 237

9. The price paid, on the purchase of a promissory note, may go to the jury on the question of good faith; but it cannot, as a matter of law, be held to impeach the title of the holder who is otherwise a purchaser in good faith, for value, and without notice. *ib*

10. Where the maker has intentionally issued a promissory note and put it in circulation as a valid note, although induced to do so by the fraud of the payee, and the same is purchased by a third person for a

valuable consideration and without notice, though at a discount greater than the lawful interest, the latter may maintain an action thereon as a *bona fide* holder. *ib*

11. The *bona fide* holder of a note which has been obtained from the maker by fraud, has no equity, as against such maker, to be protected beyond the amount of the advances he has made, upon the faith of the note. *MULLIN, P. J.*, dissented. *ib*

See AGREEMENT, 1.
MARRIED WOMEN.

PUBLIC OFFICERS.

See BONDING TOWNS, 6.

PUBLIC USE.

See CONSTITUTIONAL LAW, 8, 9, 10,
11, 12.

R

RAILROAD COMPANIES.

1. Where, in a proceeding under the general railroad act of 1850, as amended by the act of 1870, (*Laws of 1870. ch. 560, § 1.*) on the petition of a land owner for the appointment of commissioners to change the location of the route of a railroad as surveyed by the company, it appears by the testimony before the commissioners that the petitioner has failed to comply with the directions of the statute, by giving notice of the application for the appointment of commissioners, to an individual whose land, if the line of the railway be changed, as proposed by the petitioner, will be crossed and affected thereby, such proceeding is wholly void, and will be reversed, on appeal from the decision of the commissioners. *Matter of Norton v. The Walkkill Valley R. R. Co.* 77

2. Where, according to the smallest estimate of the width required for the railroad, on the proposed route, it will take a portion of the land of an individual, and according to the

largest estimate, it will take his dwelling-house; and, in any event, within six feet of his dwelling, there will be a railroad, over which he must pass to get to the highway; it cannot be said that such owner is not "affected by the proposed alteration," merely because the center line of the proposed railroad does not cross his land. *ib*

8. Such an owner comes within the purview, spirit, letter and intent of the statute which requires notice to be given the owners and occupants of lands to be affected by a proposed alteration of the route of a railroad. *ib*
4. The statute, in directing notice to be given to the owners or occupants of land to be affected by any one proposed change, clearly contemplates but one commission for that change, or proposed change; and, therefore, the greater necessity that its strict terms shall be complied with, so far as to allow all the persons to be affected by that line an equal opportunity to defend and protect their interests. *Per P. FORTER, J.* *ib*

See DAMAGES, 4, 5.
STATUTES, 4, 5.

RAILROADS.

P. was the owner of a railroad, four or five miles in length, leading from and appurtenant to, an iron ore bed owned by him, which road connected with the Harlem railroad at B., where it terminated. The respondents constructed a railroad extending from Poughkeepsie to B. At a point about two and a half miles from B. they intersected or struck the road of P., and from thence to B. had located upon, and proposed to take P.'s road-bed, embankment, excavations, rails and ties, leaving him no outlet from his ore bed, except by constructing a new road in place of the portion proposed to be taken. The commissioners of appraisal appointed in proceedings by the respondents, under the statute, to acquire the title to the land of P. proposed to be taken, in their allowance of damages, named but two items, viz., the

value of the land taken by the respondents, in its present condition, including grading done thereon, and the value of the iron and ties constituting the track as at present laid down; excluding damages arising from depreciation in value of that part of P.'s railroad not taken; also damages to arise from any depreciation in value of the ore bed by cutting off existing accommodations for transporting ore; and damages arising from delay while the respondents were using his road, and during the time required by P. to construct another road, &c. *Held*, on appeal from such appraisal, 1. That confining the damages to the actual value of the land taken, and to the actual value of the ties and track as at present laid down, was not that just compensation intended by the constitution and the statute for the injury that the taking of the property, for the purpose intended, would cause the land owner, and for all the injuries he would suffer. 2. That if P.'s ore bed, and the remaining section of his railroad, were depreciated in value by such taking, then he should have been allowed damages for such depreciation. *Matter of the Poughkeepsie and Eastern Railroad Company,* 161

See BONDING TOWNS.

REFEREE.

1. Although a referee does not find a particular fact, in terms, yet if such a finding is deemed necessary to support and uphold the judgment, the court will presume that the referee did find such to be the fact, if the evidence in the case would authorize or justify such finding. *Westcott v. Fargo,* 849
2. Where, although there was evidence of an accord and satisfaction, on the trial before a referee, yet the referee refused to find the fact, because the defence was not set up in the answer; *Held* that it was the duty of the referee to decide the case according to the evidence; and that the pleadings must be deemed to have been amended so as to include that evidence. *Brett*

v. First Universalist Society of Brooklyn, 610

RELEASE.

See PRESUMPTION, 8, 9.

RENT.

1. Where premises were conveyed to the defendant by C., *subject to the rents then due, and to become due, to Stephen Van Rensselaer and his heirs and assigns*; *Held* that by receiving his title subject to these rents, the defendant was estopped from denying that they were then subsisting liens upon the premises, and that the covenants to pay them were then in force. *Lyon v. Adde,* 89

2. But that if that were not so, there was at least an explicit admission, in writing, by C., his grantor, of the subsistence of the covenant; and that, by all the authorities, was sufficient to rebut the presumption of extinguishment; even as against a presumption of law. *ib*

3. The defendant, by the deed from C., acquired only an estate *in remainder*, subject to a life estate in M.; and that life estate was conveyed to him, in 1850, by a deed, *subject to the same conditions*. *Held* that by the ordinary rule, the payment of the rents would be charged upon the tenant for life, and therefore the defendant did not become obligated to pay them, until he received his deed from M. in 1860. *ib*

4. *Held, also*, that the lapse of time from which a presumption of payment could be drawn must date either from C.'s deed, which was less than twenty years; or from M.'s deed, which was but twelve years. And that neither was sufficient, without other special circumstances. *ib*

See LEASE.

PRESUMPTION.

VAN RENSSELAER LEASES.

REVISED STATUTES.

Where a statute has been incorporated in the text of the Revised Statutes without legislative authority, a sub-

sequent statute, purporting to amend it, is effectual for that purpose, though it refer to the former act only by its unauthorized numbering as a section of the Revised Statutes. *The People ex rel. Furman v. Clute,* 356

S

SALE.

See SHERIFF.

SHERIFF.

1. After a stock of goods, in a store, belonging to F. & T. had been levied upon by the sheriff by virtue of an attachment at the suit of P. & Co., an agreement was made by F. & T. for the sale of the goods to the plaintiff. An inventory was made, and thus the goods were designated; the price was agreed upon, a part of it paid, and notes given for the balance, after deducting the amount of the debt due in the attachment suit of P. & Co., of which debt the plaintiff assumed the payment; and a bill of sale of the goods was made by F. & T. to the plaintiff, and receipted; and all that it was in the power of the vendors to do was done, to make a delivery of the goods. *Held* that, assuming that the transaction was not fraudulent, it embraced all the elements requisite to make an effectual sale of the goods to the plaintiff. *Kinck v. Kelly,* 622

2. *Held, also*, that the sheriff was not authorized to seize or hold the goods under attachments issued against the property of F. & T. after such sale to the plaintiff was made; for the reason that the goods were no longer the property of F. & T., but of the plaintiff. *ib*

3. And the plaintiff having offered, before commencing this action against the sheriff to pay him the amount for which he held the goods at the time of the sale thereof to the plaintiff, if he would restore the goods, which the sheriff refused to do, claiming the right to hold them under the subsequent attachments; *Held* that after such refusal, a formal

tender would have been useless, and was therefore unnecessary. *ib*

4. *Held, further*, that the plaintiff's right to the possession of the goods, upon payment of the amount of the first attachment, and costs, was clear. That the offer to pay, under the circumstances, was equivalent to actual payment; and the refusal of the sheriff to restore the goods on receiving the offer of payment, was an act of conversion, on his part. *ib*

SPECIFIC PERFORMANCE.

See AGREEMENT, 8.

STATE COURTS.

See JURISDICTION.

STATUTES.

1. A leading and controlling rule in the construction of statutes is to interpret them according to the true meaning and intent. To ascertain this intent, it is the duty of the court to find by established rules what was the fair, natural and probable intent of the legislature. *The People v. Schoonmaker*, 44
2. For this purpose, the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly and distinctly the intent, according to the most natural import of the language, there is no occasion to look elsewhere. *ib*
3. But when the meaning of words is doubtful, and where it is seen that the same words have different meanings, when employed under different circumstances, or to effect different objects, resort may be had to extrinsic circumstances; and the courts may seek for that intent in every legitimate way. *ib*
4. A statute authorized commissioners, who were to be appointed for that purpose, to subscribe, in the corporate name of a town, to the capital stock of a railroad company, and to

issue bonds in the name of the town, therefor; *Provided*, however, that "no subscriptions to stock shall be made, or bonds issued, until the consent in writing, specifying the amount of such subscription and bonds to be issued, be first obtained, of a majority of the tax-payers * * appearing on the last assessment roll of such village or town, representing a majority of the taxable property of the residents of said town," &c. *Held* that it was not the intent and meaning of the legislature, nor the spirit of the act, that a canal corporation owning property within the town, and paying taxes thereon, but whose principal office and place of business was elsewhere, should be included in the language of the statute—"the residents of said town." *ib*

5. *Held, also*, that this construction, flowing from the language of the statute, was confirmed by looking at the extrinsic circumstances existing at the time of, and prior to, its enactment, viz., the holding of a meeting by the resident tax-payers of the town, and the passing of a resolution to apply to the legislature for such a change of the law contained in a previous act, as would exclude this and other corporations from voting, or giving or refusing their consent to the issuing of such bonds; followed by the action of the legislature, in passing the act in question. *ib*
6. Retrospective statutes are not forbidden by the constitution, in cases in which they do not impair the obligation of contracts, or partake of the character of *ex post facto* laws; and such statutes may be made, by express language, to have that effect. Yet, unless they are so expressed, by necessary implication, they will be interpreted otherwise, and so that they shall not operate to change the existing state of things, or the common law. *The People ex rel. Pitts v. The Board of Supervisors of Ulster County*, 88
7. The only exception to this rule is, that the doctrine does not apply to remedial statutes; which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and

only go to confirm rights already existing, and are in furtherance of the remedy, and add to the means of enforcing existing obligations. *ib*

8. Even remedial statutes are not excepted from the general rule, except in those cases where no other construction can be given without leaving the enactment of no effect; or where such a retrospective construction is a necessary implication from the language employed. *ib*

9. By an act of the legislature passed in April, 1871, (*Laws of 1871*, § 5, ch. 696) the board of supervisors of any county in the state, (except New York and Kings,) were authorized by a two-thirds vote, to legalize the irregular acts of any town officer, performed in good faith, and within the scope of his authority; provided such legalization should be recommended by the county court of such county, and to correct any manifest clerical or other error in any assessments or returns made by any town officer to such board of supervisors, &c. In this case, the county judge of Ulster county, assuming to act under this statute, recommended that the taxes which had been assessed against the relator for the years 1866, 1867 and 1868, be refunded to her, and made an order to that effect. The board of supervisors refused to refund or allow such taxes. *Held* that the statute in question was to be held as *prospective* only; and did not have a retro-active effect, so as to include taxes assessed prior to its passage. Order granting preceptory mandamus reversed. *ib*

10. Chapter 80 of the laws of 1858 was operative as an amendment of chapter 352 of the laws of 1829. *The People ex rel. Furman v. Clute*, 356

See BONDING TOWNS.
INCHOATE RIGHTS.
MARRIED WOMEN.
REVISED STATUTES.

STREETS.

See ASSESSMENTS FOR STREETS.

SUBSCRIBING WITNESS.

See ATTESTING WITNESS.
EVIDENCE.

SUPERINTENDENT OF THE POOR.

1. A supervisor of a town is ineligible to the office of superintendent of the poor. *The People ex rel. Furman v. Clute*, 356
2. Where a city charter declares the supervisors of the wards of the city shall be "subject to all the provisions of law now applicable to those officers respectively, in the several towns of the State," the supervisors of such wards are ineligible to the office of superintendent of the poor. *ib*
3. The legislature has power to prescribe qualifications for the office of superintendent of the poor. *ib*

SUPERIOR EQUITY.

K. contracted, in writing, to sell a lot of land to F. The latter being unable to pay for K, applied to the defendant to advance the purchase money and take a deed of the land from K.; and give F. a contract for a deed to be executed on payment of the purchase money advanced, with interest. The defendant advanced \$600, and took a deed of the land. On the 2d of March, 1857, he gave a contract to F., agreeing to convey the land to him on payment of \$600 and interest. F. was in possession of the land. On the 12th of March, 1857, F. applying to the defendant for further advances, it was agreed between them that the defendant should retain the title of the land until he should be paid such other sums as he might let F. have, or become holden for. Such further advances were made, by the defendant, March 1st, 1859. On the 21st of April, 1859, F. sold and assigned the contract of March 2, 1857, to the plaintiff, a part of the consideration being the amount due upon certain notes of F. on which the plaintiff was indorser, and of which he assumed the payment. The plaintiff went into possession of the premises, and continued therein, making payments, from time to time, of interest accruing upon the contract. There was no evidence that the plaintiff purchased the contract with any fraudulent design; and he had no notice of any lien of the defendant, beyond the purchase money.

Held, 1. That the plaintiff was a *bona fide* purchaser; and that his agreement to assume the payment of the notes of F. was parting with value, so as to make him a *bona fide* holder for value paid. 2. That the defendant had a better right to retain the title of the premises until his advances, made in pursuance of the agreement of March 12, 1857, were paid, than the plaintiff to a deed of the premises on paying the unpaid purchase money, only. 3. That the defendant's equity was superior to that of the plaintiff, because it was the oldest in time, and was so far superior as to override the rights and equities of the plaintiff as a *bona fide* purchaser for value. 4. That the principle laid down in *Bush v. Lathrop*, (22 N. Y. 585,) was decisive of this case. 5. That there was no *estoppel* in the case, as against the defendant. *Reeves v. Kimball*. 120

SUPERVISOR.

See SUPERINTENDENT OF THE POOR.

SUPREME COURT.

1. Where two of the justices assigned to the general term of the Supreme Court in the first department are, by reason of interest, incapable of sitting, on an appeal, the general term may be held by one of the justices of the first department, assigned to hold general terms, and two justices from another department. *Matter of the Broadway Widening*, 572
2. The appeal, in such a case, need not be sent to another department, under section 10 of chapter 408 of the Laws of 1870. *ib*

SURROGATE.

1. Under the provision of the Revised Statutes directing that where the real estate of a deceased person shall have been sold by order of a surrogate, the moneys arising from the sale shall be brought into the office of the surrogate, for the purpose of distribution, and shall be by him retained for that purpose; and requiring the surrogate, in the first

place, to pay, out of such moneys, the charges and expenses of the sale, there can be no *lien* upon such moneys, even for the fees and disbursements upon the application for the sale. *Matter of Lamberson*, 297

2. The entire fund must be brought intact into the office of the surrogate, and the attorney can then apply to that officer, whose duty it will be, before making the general distribution, to award and pay him a reasonable fee for his services in the matter of the sale, together with his necessary outlay thereon. *ib*
3. For services rendered to the administratrix, apart from the matter of the sale of the real estate, there is not only no *lien*, but no right to priority of payment. Such priority is confined to the "charges and expenses of the sale." *ib*
4. And apart from the statute, in any case where moneys are realized or received under the orders of a court, competent to deal equitably with the fund, there can be no *lien* upon the same for any services rendered; but such services must be paid for, if it be sought to charge the fund, by the order of the court where the matter is pending. *ib*

T

TAXES.

See BONDING TOWNS.

TAX-PAYERS.

See ACTION.
BONDING TOWNS.

TOWN ELECTIONS.

See ELECTION AND ELECTORS.

TOWNS.

See BONDING TOWNS.

TRIAL.

See APPEAL, 1, 5, 6.

TRUSTS AND TRUSTEES.

1. No valid trust can be founded upon an interest derived from an illegal contract, or established in contravention of the general policy of the law. *Bettinger v. Bridenbecker*, 385
2. Although the wishes of a *cestui que trust* should not, in all cases, control the removal or the appointment of a trustee, yet where the *cestui que trust* is of full age, in every way competent to judge for himself, and to form an opinion as to what person would be agreeable to him as a trustee, his wishes should have great weight with the court. *Matter of the petition of Morgan*, 621
3. Where two of the trustees and the *cestui que trust* joined in a petition praying for the removal of the third trustee, and a referee made a report recommending the removal, the court, considering the intimate and confidential relations and transactions existing between trustees and the *cestui que trust*; that the person really in interest was the *cestui que trust*; that she was of mature age; and that difficulties had arisen among the three trustees, and the *cestui que trust* sympathised with the two who joined with her in the petition, removed the third trustee; although there was nothing in the report affecting his moral character, and it appeared that he had intended to discharge the duties of his office with strict fidelity. *ib*

See AGREEMENT, 10.
CORPORATIONS, 7, 8, 9.

U

UNITED STATES.

See DEVISE.

USAGE.

See CUSTOM.

USURY.

1. Where the defence of usury is unavailable to a corporation, it is also

unavailable to one who has guaranteed the payment of its bonds. *MULLIN, J.*, dissented. *Smith v. Alford*, 415

2. Corporations being prohibited, by statute, from interposing the defence of usury, in any action, one who has guaranteed the payment of bonds issued, in this State, by a foreign corporation, for the payment of loans, in pursuance of a resolution of the directors, at a meeting held in this State, which bonds bear an interest of ten per cent, and are valid by the laws of the State where the corporation is located, cannot set up the defence of usury, when sued upon a bond, as guarantor. *ib*

V

VAN RENSSELAER LEASES.

1. As to the nature of the relations created by indentures of lease of lands, in fee, in the manor of Rensselaerwyck, that cannot be deemed an open question, in this State. It has been settled, by numerous adjudications upon the Van Rensselaer leases, in the Court of Appeals; where it has been held that such instruments are deeds of assignment, leaving no estate, reversion or possibility of reverter in the grantor; and not creating a *rent service*. But they do create a *rent charge*, which is properly styled *rent*. *Per P. PORTER, J. Lyon v. Adde*, 89
2. They create the relation of landlord and tenant; and the grantor's interest is an hereditament, descendible and hereditary. *ib*
3. It follows, that any release of the rent must be by deed; and that there can be no presumption of payment, arising from lapse of time. *ib*

VENDOR AND PURCHASER.

1. A vendor of chattels, upon the refusal of the purchaser to complete the contract, on his part, by paying over the purchase money, has an election, and may resort to one of three remedies: 1st. Upon tendering the property, and after giving the

- buyer a reasonable time to accept and pay for the property, the seller may regard the contract as abandoned by the purchaser, he being put in default by his refusal to pay. Then the vendor may sell the property as his own, and apply the proceeds to his own use. And it is wholly immaterial, to the buyer, whether, on such sale, the property brings more or less than the contract price, or is sold above or below its value. 2d. The seller may retain the possession of the property, as his security, and sue the purchaser for the contract price. When such payment is enforced and complete, the vendee is entitled to the possession of the property. Or, 8d. The vendor may resell the property, upon giving notice to the vendee, of his intention to do so, and after applying the net proceeds towards payment of the contract price, may sue the purchaser for any balance that then remains unpaid. If more is realized than is due the vendor, he must account to the purchaser for the surplus. *Wentfall v. Peacock*, 209
2. When a vendor pursues the vendee, by action, to recover the whole or a balance of the purchase money, he is acting in affirmance of the contract, and counts upon it. *ib*
 3. And having made his election of remedies, by bringing such an action, he has no right, thereafter, to resell the property, or to disaffirm the contract and reclaim the property. *ib*
 4. The remedies given to a vendor, upon the refusal of the purchaser to take and pay for the property, are not concurrent. The choice between them having been made, the others are gone forever. *ib*
 5. It was not the intention of the legislature, by the sections of the Revised Statutes relative to fraudulent sales of goods and chattels, (8 R. S. 222, §§ 5, 6, 5th ed.) to provide that after a sale of personal property, it might not at any time pass into the possession of the vendor, without raising the presumption that the sale was made with intent to defraud creditors. *Knight v. Forward*, 811
 6. When it appears that property has passed into the hands of the vendor for a mere temporary purpose, and under circumstances which show that the return of the possession was not with a view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor are not authorized to attack the sale as fraudulent and void. *ib*
 7. Where, upon the sale of a cutter by a son, to his father, there was an immediate change of possession, but the father occasionally allowed his son, the vendor, to use the property, and after use, it was again returned to his possession; *Held* that the change of possession was continued, within the meaning of the statute; and that there was no presumption of fraud, against the sale. *ib*
 8. Where a fraudulent intent cannot, under the circumstances, be presumed, against a purchaser, it is not necessary for him to disprove such intent. If the facts proved are such as to carry the question of fraud, in a sale, to the jury, and they have found against it, their finding is conclusive. *ib*
 9. A purchaser of personal property to be delivered at a future day may, by *express contract*, relieve himself from the obligation to return the property on discovering its inferiority, and still hold the vendor responsible for the deficiency in quality. *Day v. Pool*, 508
 10. He may do this by taking an *express warranty*, at the time of the purchase, that the goods, when delivered, shall possess the particular qualities which it is important for him to secure. *ib*
 11. The cases of *Hargous v. Stone*, (5 N. Y. 78,) and *Reed v. Randall*, (29 id. 358,) expressly recognize the right of a vendee, upon an executory sale, to protect himself against the contingency of being obliged to use, at his own risk and loss, an inferior article or to be deprived of it altogether, when to attempt to supply its place might be attended with great inconvenience and loss. That the mode of effecting this object is by exacting an express warranty. And that in such a case, the doc-

trine of warranty applies, at the option of the vendee, to the same extent as if it were an executed sale; in which latter case, it is well settled that the vendee is under no obligation to return the property on ascertaining that it does not fulfill the warranty, but may keep it, and rely on the warranty for redress. *ib*

12. The plaintiffs on purchasing from the defendants 80 barrels of rock candy syrup, to be used by them in the manufacture of wine, observed to the defendants' agent that in some syrups they had seen, sugar would fall down, and some would crystallize to candy; to which the agent replied, "Our syrup will not crystallize, nor sugar fall down. I warrant our syrup all right."

Held that this representation, in connection with evidence that the purchase was of rock candy syrup, that it was so billed to the plaintiffs, and that rock candy syrup will not crystallize, or the sugar fall down, tended to show an express warranty that the syrup to be delivered under the contract should be rock candy syrup, or at least, syrup which would not crystallize, or deposit the sugar. *ib*

13. *Held, also*, that the interpretation of this conversation, and what particular warranty was intended, was a question for the jury. *ib*

14. The plaintiffs notified the defendants that they had some doubts whether the sugar sent them was such as had been bargained for, and had some suspicions it was not, but were inclined to risk using it. The defendants, instead of cautioning the plaintiffs against using the sugar if it was not of the quality ordered, or offering to take it back, replied in a way calculated to induce them to go on and use the syrup, and to lead them to repose upon the idea that they, the defendants, would make the matter right. *Held* that the idea that both parties supposed they were acting under an express warranty, was strengthened by this correspondence. *ib*

5. *Held, also*, that if the defendants, on receiving this notification, were not

absolutely called upon to caution the plaintiffs against using the syrup, if they intended to insist that by using it the plaintiffs would waive all claim against them for any deficiency of quality, certainly fair dealing would not permit them to lull the plaintiffs into security, by suggesting, in ever so vague a manner, that the defendants would make a fair deduction if the quality of the syrup was not up to the contract. *ib*

See EVIDENCE, 12.

SHERIFF.

WITNESS, 4.

VERDICT.

1. To justify an appellate tribunal in setting aside a verdict on the ground that it is against the weight of evidence, it must be *entirely* against the weight of evidence. *Morse v. Sherrill*, 21
2. A new trial will not be granted where the testimony is contradictory, and the character and credit of the witnesses questioned, on the ground that the verdict is against the weight of evidence. *ib*
3. The verdict of a jury, in cases of conflict of testimony, can only be set aside when the case itself presents the evidence that the jury must have been influenced by passion, prejudice or mistake. *ib*
4. Although there may be cases in which the ends of justice demand that the court should possess the power to correct *abuses* committed by a panel of jurors, that power should be limited by reasonable rules. It must be an abuse; it must be such a verdict as evinces that it was the result of passion, prejudice, mistake or corruption; such a verdict as shocks the common judgment; or such as is without evidence to support it, or is so against a striking preponderance of evidence that a common exercise of judgment demands its reversal. *ib*

W

WAIVER.

After judgment, a party will be presumed to have waived any objection that he might have taken, on the trial, but omitted to take. *Rue v. Perry*, 40

See EVIDENCE, 11.
JUSTICE OF THE PEACE.
NUISANCE, 7.

WARRANTY.

1. In an action for a breach of warranty on the sale of a pair of horses, the warranty was shown to have been a qualified and conditional one, involving the necessity of the plaintiff's following the condition, viz., to treat the defect (a bunch on the leg) with salt and vinegar. *Held* that the plaintiff was bound so to treat it, and this was a good excuse for refusing to try another treatment, which might hazard the effect of the warranty. *Smith v. Borst*, 67

2. And the plaintiff having proved that he called a horse farrier to examine the bunch, who gave him an opinion as to how he should treat it, the defendant, to show that the failure to cure the bunch was owing to the negligence of the plaintiff, proved by the farrier, on cross-examination, that the plaintiff did not pursue his advice, and for that reason no cure was effected. *Held* that, to rebut the effect of this evidence, it was not erroneous for the plaintiff to prove, by the farrier, that after he had told the plaintiff what course he should pursue, to effect a cure, the latter said he had no right to pursue that course; as he had been instructed, by the man of whom he bought the horse, to use salt and vinegar, to cure the bunch. 68

3. After an agreement for an exchange of horses had been made between the parties, and consummated by a delivery, the plaintiff returned the horse he had received, and, after rescinding the first agreement, a new bargain was made, by

which the defendant sold his horse to the plaintiff, for \$100. *Held* that the representations and warranties made by the defendant on the first bargain did not enter into and form a part of the second, so as to constitute a defense to an action for fraud or breach of warranty. *Shull v. Ostrander*, 130

4. The general rule is, that the representations or affirmations constituting a warranty, or the representations which are charged to be false, must be made during the negotiations for the sale. 130

5. A warranty must be made during the treaty, or at the time of the sale; or at least, before the performance of the substantial terms thereof. 130

See GRANT.
VENDOR AND PURCHASER, 10,
12, 13, 14.

WILL.

A will contained a devise of the residue of the testator's estate, real and personal, to the Government of the United States, at Washington, "for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States." *Held*, 1. That under this will, the United States Government could not take the real estate so devised. 2. That if the devise was to be considered as a trust in the United States, to apply the property devised, for the specified purpose of assisting to pay the debt contracted by the war, such a trust was not only invalid, but there was no competent trustee to take. 3. That the land being in this State, the validity of the trust was to be decided according to the laws of this State. 4. That the doctrine of equitable conversion could not be applied to the case, so as to make it the duty of the executors to sell the real estate and convert it into personalty, for the purpose of carrying out the intent of the testator. *Matter of the probate of the will of Fox*, 157

See DEVISE.

WITNESS.

1. A witness can only be impeached as to material evidence. *Knight v. Forward*, 311
2. Evidence which goes to show that a witness has given versions, out of court, of the transaction to which he is testifying, essentially different from, or wholly inconsistent with, the truth of the evidence given by him, is admissible on the ground that his reputation for truth and veracity is directly assailed. *ib*
3. It is competent to examine a witness as to contradictory statements

made by him, and to contradict him if he denies having made them. *ib*

4. A vendor of property, being examined as a witness to prove the sale, was asked, on his cross-examination, whether he had not, at a time subsequent to the alleged sale, offered to sell the same property, as the owner thereof, to another. This question was objected to, and the objection sustained. *Held* that this was legitimate cross-examination, and the party was entitled to the witness' answer; and that the court erred in rejecting the evidence. *ib*

See CRIMINAL LAW, 8 to 12. EVIDENCE.

END OF VOLUME SIXTY-THREE.

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